90-431

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE, *ex rel.*
THE DISPATCH PRINTING COMPANY,
Petitioner,

v.

THE HONORABLE RONALD L. SOLOVE,
and DAVID L. STRAIT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether juvenile courts are exempt from the First Amendment right of public access to judicial proceedings.

2. Whether a juvenile court may impose a gag order on trial participants without subjecting the order to First Amendment scrutiny.

LIST OF PARTIES

The petitioner in this case is The Dispatch Printing Company. Respondent the Honorable Ronald L. Solove is a Judge on the Franklin County, Ohio Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("Juvenile Court"). Respondent David L. Strait is the court-appointed guardian ad litem for the minor child, Tessa Reams.

Pursuant to Supreme Court Rule 29.1, the Court is advised that The Dispatch Printing Company has no parent corporation nor any subsidiaries that are not wholly-owned.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, The Dispatch Printing Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in this proceeding on June 13, 1990.

DECISIONS BELOW

The decision of the Ohio Supreme Court (App. 1a-39a) is reported at *In re T.R.*, 52 Ohio St. 3d 6, 556 N.E.2d 439 (1990). The opinion of the Ohio Court of Appeals (App. 40a-72a) is unreported, as are the closure and gag orders entered by the Juvenile Court (App. 73a-79a).

JURISDICTION

The opinion of the Ohio Supreme Court was entered as its judgment on June 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

3. Both Section 2151.35(A) of the Ohio Revised Code and Rule 27 of the Ohio Rules of Juvenile Procedure provide in relevant part:

> The juvenile court may conduct its hearings in an informal manner and may adjourn its hearings from time to time. In the hearing of any case, the general public may be excluded and only those persons admitted who have a direct interest in the case.

STATEMENT

A. The Custody Dispute

In 1982, Richard and Beverly Reams, a married couple living in central Ohio, employed a "surrogate mother service" to facilitate an arrangement in which they would contract with an unrelated woman to bear a child on their behalf. The couple had learned of the service from an article in *The Columbus Dispatch*, which is the principal daily newspaper in Columbus and central Ohio and is published by Petitioner, The Dispatch Printing Company ("The Dispatch"). The Reamses were the first couple to sign up with the service, an event that received front page coverage in *The Dispatch*. The Reamses later

entered into a "surrogacy" contract with Norma Lee Stotski, who then conceived a child through artificial insemination of sperm from an unrelated donor. On January 12, 1985, Ms. Stotski gave birth to Tessa Annaleah Reams. The Reamses took custody of Tessa the following day.

In May 1987, Richard and Beverly Reams filed separate divorce petitions, and both sought to retain custody of Tessa. After learning of the divorce proceedings, Ms. Stotski also sought custody of the child. Beginning in June 1987, the novel and controversial issues raised by this custody dispute received substantial coverage in *The Dispatch* and other local news media.

The custody issue was not resolved in the Reamses' divorce proceedings, and in September 1987, Mrs. Reams, now known as Beverly Seymour, filed a civil action against Mr. Reams in the Juvenile Court seeking permanent custody of Tessa ("the custody action"). The Juvenile Court appointed a guardian ad litem for the child, respondent David L. Strait.

Approximately one year later, while the custody action was still pending, Ms. Seymour and Mr. Reams filed separate adoption petitions in Franklin County Probate Court. At a hearing in December 1988, the Probate Court informed both parties that their petitions would be dismissed unless each posted a $3,000 bond. After that hearing, the Probate Judge met with Mr. Reams in the Judge's chambers and encouraged Mr. Reams to give up his efforts to obtain custody of Tessa so that she could be adopted by a wealthy couple on the East Coast.[1]

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[1] *See* Brief Amicus Curiae in Support of Relator-Appellee Submitted by Beverly Ann Seymour, Pro Se at 13, *In Re T.R.*, 52 Ohio St. 3d 6, 556 N.S.2d 439 (1990) ("Seymour Amicus Brief"). In an interview with *People* magazine, the Probate Judge stated: "It's our position that we have to seek out the best possible adoption for the child. In this case we have two people petitioning for adoption

Mr. Reams told Ms. Seymour of the Probate Court's desire to place the child with strangers. Frustrated by months of inactivity in her custody action and knowing that neither she nor Mr. Reams could afford to post a $3,000 bond in their adoption proceedings, Ms. Seymour concluded that the "only recourse" left to her was to "cry out" for public scrutiny of the proceedings. Seymour Amicus Brief at 14, 17. She prepared a two-page "news release" that described the custody battle, and sent it to newspapers across the country. Ms. Seymour's efforts resulted in substantial coverage in the national media, including *People* magazine, *The Star* magazine, the television program "A Current Affair," and a detailed story in the *New York Times*, which quoted Ms. Seymour as stating, "I've been Tessa's mother in fact for four years, and I'm living in terror that the court's going to take her away and put her up for adoption with some strangers." N.Y. Times, Jan. 26, 1989, at A12.

B. The Gag and Closure Orders

In response to Ms. Seymour's effort to encourage scrutiny by the national media, the guardian ad litem initiated a separate action in the Juvenile Court to declare Tessa a "dependent child" under Ohio Rev. Code § 2151.353(A), which would allow the State to take custody of the child. The dependency action was consolidated with Ms. Seymour's custody action. The guardian ad litem then filed motions seeking a gag order on Ms. Seymour and the other parties and to exclude the public and media from all future proceedings. To that point, the custody action had been open to the public and the press.

The Juvenile Court Judge assigned to the custody and dependency actions, respondent the Honorable Ronald L. Solove, considered the gag order motion first. At a hear-

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who are unrelated to the child and who have divorced. That never makes a happy group. Whereas we could put the child with people who have nothing but pluses." People, Feb. 20, 1989, at 38.

ing on the issue, a psychologist—while admitting she had never met Tessa and was not familiar with the facts of the case—testified that publicity of *any* custody dispute is "contrary to the best interests of the child," and would "heighten the potential for harm." Tr. of Feb. 21, 1989 Hearing at 55, 57. The Dispatch did not participate at this hearing.

At the end of the hearing, Judge Solove decided to impose a gag order, stating:

> So long as there is a scintilla of possibility of harm to the child, this Court will restrict the rights of the adults involved. And it is clear to me that there is at least a real possibility that the continued attention to this matter will result in harm to the child.

Id. at 82. The order entered by Judge Solove prohibited the parties from "disseminating any information about this pending cause or about the minor child Tessa Reams to any and all persons, . . . [including the] media." App. 79a.

Judge Solove considered the closure issue next. The only evidence offered in support of closure was testimony from the social worker assigned to the case. She opined that press coverage was "not helpful" to the child, and that "the more exposure there is, . . . the greater the possibility of harm." Tr. of Mar. 8, 1989 Hearing at 22, 28. The Dispatch participated at this hearing. In addition to arguing that the general testimony of the social worker was insufficient to override the First Amendment right of access, The Dispatch presented the testimony of its Managing Editor to detail how press coverage would inform the public of potential problems with surrogacy arrangements, help prevent them from reoccurring, and provide an informed basis for public regulation of this controversial practice.

After the hearing, Judge Solove issued an order closing "the trial and all other proceedings in this matter" to

the media and the public. App. 77a. Recognizing that there was "a presumption in favor of the openness of all judicial proceedings" under the First Amendment, Judge Solove based the closure order on three findings: (i) that "additional publicity focused on this action might be harmful to the child"; (ii) that public access to the proceedings might induce the guardian ad litem to withhold evidence; and (iii) that total closure was "appropriate," since the "necessity that a full hearing" be conducted "in an orderly fashion prevents exclusion of the media on a 'piece meal' basis." App. 75a-76a.

C. The Writ of Prohibition by the Court of Appeals

The Dispatch then sought a writ of prohibition in the Ohio Court of Appeals for the Tenth Appellate District. In support of the writ, The Dispatch argued that the gag and closure orders violated the First Amendment, and that the First Amendment required the Court of Appeals to conduct an independent review of the evidence on which the orders were based.

The Court of Appeals issued a writ prohibiting enforcement of both the closure and gag orders. The court's decision was based on its finding that there is a presumption of openness for juvenile courts and thus a corresponding qualified right of public access under the First Amendment and Ohio Constitution. App. 61a-62a. The court held that Judge Solove "applied the wrong standard, dealing in possibilities or potentialities, rather than probabilities," noting that because the "possibility" of harm exists in every case, Judge Solove's reasoning would require that every custody and dependency hearing be closed to the public, contrary to the presumption of openness. App. 63a-67a. The court also held that the evidence received at the two hearings was "insufficient" to justify the gag and closure orders, ruling that evidence "must demonstrate a basis in the particular case for

closure and demonstrate the probability of harm." App. 64a.

D. The Ohio Supreme Court's Decision

Judge Solove and the guardian ad litem appealed to the Ohio Supreme Court, which rejected the Court of Appeals' First Amendment analysis. Indeed, the Ohio Supreme Court rejected any application of the First Amendment. Considering the closure issue first, the Ohio Supreme Court relied on dicta from two decisions of this Court to conclude that "[j]uvenile proceedings are usually private." App. 17a.[2] The court further stated its belief that "[c]ustody proceedings in the juvenile court would benefit little from public access." App. 19a. Accordingly, the court held "that there is no qualified right of public access to juvenile court proceedings to determine if a child is abused, neglected or dependent, or to determine custody of a minor child." App. 20a.

Having found the First Amendment inapplicable, the Ohio Supreme Court then determined the appropriate standard for closure under Ohio Rev. Code § 2151.35, which provides that the general public "may" be excluded from a juvenile court proceeding. The court concluded that custody and dependency actions in juvenile court "are neither presumptively open nor presumptively closed to the press and public," and that, pursuant to § 2151.35, they may be closed

> if, after hearing evidence and argument on the issue, it finds that: (1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the

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[2] The Ohio Supreme Court cited *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 105 (1979), and *In re Oliver*, 333 U.S. 257, 266 n.12 (1948). It also cited dicta from its own decision in *In re Agler*, 19 Ohio St. 2d 70, 73, 249 N.E.2d 808 (1969).

> proceeding, and (2) the potential for harm outweighs the benefits of public access.

App. 23a. Although The Dispatch had contended that the First Amendment required an independent review of the record, the Ohio Supreme Court held that a closure decision "should stand unless the trial judge has abused his or her discretion in applying the standard we have set" and that Judge Solove did not abuse his discretion in this case. *Id.*

Turning to the gag order, the Ohio Supreme Court recognized that it "limit[s] the *parties'* freedom to disseminate information already in their possession," App. 27a (emphasis in original), but declined to apply the presumption against the validity of such prior restraints under the First Amendment. Instead, the court held that "a juvenile court, which is not presumptively open, has the power to control extrajudicial comments by the litigants, provided the restrictions are consistent with the standards we have set" for closure of such proceedings under Ohio Revised Code § 2151.35 *See* App. 28a.

Applying this *statutory* standard, the court found "a reasonable and substantial basis for believing that public access *could* psychologically harm Tessa" and "that Seymour's media campaign *could* endanger the fairness of the adjudication." App. 30a (emphasis added). Based solely on these two findings, the court held that the decision to impose the gag order was not an abuse of discretion. App. 30a.[3]

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[3] The court stated that the gag order as written was overly broad, and therefore directed the Juvenile Court to issue a more limited gag order that would prohibit contact with the media but not with other individuals, such as counsel, other parties, or Tessa's teachers and doctors. App. 30a-31a.

E. The Custody Hearing and Release of the Transcript

After the Ohio Supreme Court's decision, the custody hearing went forward behind closed doors on August 14, 1990.[4] The closed proceedings led, however, to a tragic and very public result. At the conclusion of the hearing, Judge Solove awarded custody of Tessa to Richard Reams. When Mr. Reams subsequently arrived at Ms. Seymour's residence to take Tessa, Ms. Seymour shot and killed Mr. Reams. Both the shooting and Ms. Seymour's confession received extensive coverage by the news media. *See, e.g.*, The Columbus Dispatch, Aug. 29, 1990, at 1A. Ms. Seymour's reported reason for the shooting was a lack of faith in the judicial proceedings: "'[s]he felt she had not been given a fair opportunity by the courts.'" *Id.* (quoting county sheriff).

As a result of this tragic incident, Judge Solove, acting at The Dispatch's request, opened the record of the previous custody action to the public, including the transcript of the August 14, 1990 custody hearing. However, the future proceedings to find a new family and new home for Tessa remain closed.[5]

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[4] Acting on a statement in the Ohio Supreme Court's opinion that no "workable 'less restrictive' alternative" to complete closure had been demonstrated, App. 26a, The Dispatch moved on August 6, 1990 for limited access and proposed what it believed would be a workable alternative to total closure of the custody trial. Ruling from the bench, Judge Solove denied the motion, announcing he would consider sanctioning counsel for The Dispatch for filing the motion. After a further hearing, however, he declined to impose sanctions.

[5] The belated access to the record of the custody action does not render this case moot; as this Court has held in similar circumstances, the issue presented is "capable of repetition, yet evading review." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976). *Accord Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) (case not moot even though transcript of closed preliminary hearing released); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03 (1982).

REASONS FOR GRANTING THE PETITION

This case presents two important constitutional questions that have never been addressed by the Court: whether juvenile court proceedings are stripped of any First Amendment right of public access, and whether the First Amendment permits a court to gag trial participants based only on a speculative finding that harm "could" result from media coverage of the proceeding.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER JUVENILE COURTS ARE EXEMPT FROM THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS TO JUDICIAL PROCEEDINGS

The Ohio Supreme Court determined that the First Amendment has no applicability to juvenile court proceedings. This Court's decisions, in contrast, have recognized that the First Amendment is applicable to court proceedings and generally establishes a right of public access. All of this Court's cases, however, have arisen in the criminal context, resulting in uncertainty as to the scope of the right of access in civil contexts in general, and juvenile courts in particular.

Removing this uncertainty is an important task, given the significant public issues that often are addressed in juvenile proceedings. Moreover, in the absence of guidance from this Court, the issue of public access to juvenile courts has resulted in diverse and conflicting decisions by state courts. The Court should grant certiorari to resolve these conflicts and confirm the First Amendment right of public access to juvenile courts.

A. The First Amendment Right Of Access To Juvenile Courts Is An Important Issue That Has Not Been, But Should Be, Addressed By This Court

Through a series of cases, this Court has recognized that the press and public have a qualified First Amendment right of access to judicial proceedings. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion). Like many rights under the First Amendment, the right of public access is not absolute; it may be overcome, but only by

> an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise I, 464 U.S. at 510.

Each of the cases concerning the right of access has arisen in the context of criminal proceedings; the Court has expressly reserved the question of access to civil proceedings. *Richmond Newspapers*, 448 U.S. at 580 n.17. Thus, there is a gap in this Court's First Amendment jurisprudence. *Compare Globe Newspaper*, 457 U.S. at 611 (O'Connor, J., concurring) (noting that the Court's decisions recognizing a qualified First Amendment right of access do not "carry any implications outside the context of criminal trials"), *with Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring) ("the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal").

In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), Justice Stewart recognized the important issues that may fall within this gap, noting that "in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Id.* at 386 n.15. This observation is confirmed by the frequent litigation over the constitutional right of public access to civil proceedings.[6]

The juvenile context, too, often involves compelling issues of public interest. For example, the particular scenario involved here—surrogate parenting—has generated considerable public debate and legislative activity.[7] More generally, the functioning, and inherent limitations, of the juvenile court system as a whole is an important public issue, in need of the public scrutiny brought about by a clarified right of access. *See, e.g., In re S. Children*, 140 Misc. 2d 980, 988-89, 532 N.Y.S.2d 192 (Fam. Ct. 1988) (noting that it is "necessary to open the Family Court in order that the public learns about the plight of children who enter the child protective system").

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[6] *See, e.g., Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371 (8th Cir. 1990) (affirming closure of hearing on school district's motion to enjoin handicapped child from attending school); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (no First Amendment right of access to summary jury trial proceeding), *cert. denied*, 109 S. Ct. 1171 (1989); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984) (First Amendment right of access applies to hearing on motion to enjoin proxy solicitation); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (First Amendment right of access applies to hearing on motion to terminate shareholder derivative suit).

[7] Since March 1986, when the case of "Baby M" first began to focus the public's attention on the subject, more than 60 bills have been introduced in state legislatures and three in the United States Congress to ban, regulate, or study the subject of surrogate parenting. *See Baby M Case Still Shadows 3-year-old*, The Columbus Dispatch, Mar. 14, 1989, at 2D. *See generally In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

B. State Courts Addressing The First Amendment Right of Access To Juvenile Courts Have Reached Conflicting Decisions

Without guidance from this Court, state courts have developed conflicting approaches to the Constitution's role in ensuring public access to juvenile courts. Some courts have expressly found a First Amendment right of access and applied the *Press-Enterprise* standard to closure efforts. The Supreme Court of South Dakota, for example, found that the " 'First Amendment right of access cannot be overcome by the conclusory assertion that the publicity might deprive' the juvenile of his rights or protections," and held that "[c]losure of juvenile proceedings should not occur unless specific supportive findings are made which demonstrate that closure is essential to preserve higher values and the order must be narrowly tailored to serve that interest." *Associated Press v. Bradshaw*, 410 N.W.2d 577, 580 (S.D. 1987) (quoting *Press-Enterprise II*, 478 U.S. at 15). *See also In re Chase*, 112 Mis. 2d 436, 446 N.Y.S.2d 1000, 1009 (Fam. Ct. 1982) (applying *Richmond Newspapers* and considering "the presumptive openness of juvenile trials as a public and press right of the highest magnitude"); *In re Richmond Newspapers, Inc.*, 16 Media L. Rep. (BNA) 1049 (Va. Cir. Ct. 1988) (recognizing constitutional right of access to juvenile proceedings); *Sprecher v. Sprecher*, 15 Media L. Rep. (BNA) 1778 (N.Y. Sup. Ct. 1988) (finding child custody proceeding to be "presumptively open to public and press" and permitting television networks to videotape the trial).[8]

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[8] Other state courts, while not addressing the First Amendment issue, have rejected the notion that juvenile court proceedings are presumptively closed and reaffirmed a right of public access under state law. *See Wideman v. Garbarino*, 160 Ariz. 16, 770 P.2d 320 (1989); *State ex rel. Oregonian Publishing Co. v. Deiz*, 289 Or. 277, 613 P.2d 23 (1980); *Brian W. v. Superior Court*, 20 Cal. 3d 618, 574 P.2d 788 (1978).

In sharp conflict, other state courts, like the Ohio Supreme Court here, have rejected the claim that the First Amendment affords a right of public access to juvenile proceedings. In *Edward A. Sherman Pub. Co. v. Goldberg*, 443 A.2d 1252, 1258 (R.I. 1982), for example, the Rhode Island Supreme Court stated flatly that the right of access recognized in the *Richmond Newspaper* line of cases, "does not apply to juvenile proceedings." *See also F.T.P. v. Courier Journal & Louisville Times Co.*, 774 S.W.2d 444 (Ky. 1989) (First Amendment does not afford public right of access to appellate stage of juvenile proceedings since state statute excludes public from juvenile courts), *petition for cert. filed*, 59 U.S.L.W. 3055 (U.S. July 16, 1990) (No. 90-107); *Morgan v. Foretich*, 521 A.2d 248, 253 (D.C. Ct. App. 1987) ("the presumption of openness that underlies the *Press-Enterprise* standard does not attach to the evidentiary phase of a civil contempt hearing in a child custody and visitation rights case"); *In re J.S.*, 140 Vt. 458, 438 A.2d 1125, 1129 (1981) (First Amendment does not provide a right of access to juvenile courts).

A third group of courts have developed various "intermediate" approaches to the issue. In *Taylor v. State*, 438 N.E.2d 275 (Ind. 1982), *cert. denied*, 459 U.S. 1149 (1983), the Indiana Supreme Court adopted a balancing approach, weighing "the need to protect juveniles from the dissemination of information regarding minor offenses . . . [against] the extraordinary protections afforded by the constitutional guarantees of free speech and press." *Id.* at 278-80.[9] The Georgia Supreme Court has chosen a more restrictive intermediate approach. In *Florida Publishing Co. v. Morgan*, 253 Ga. 467, 322 S.E. 2d 233 (1984), the court permitted a rule of presumptive closure for juvenile court hearings, but held that the

[9] Similar "balancing" approaches have been taken in South Carolina, *Ex Parte Columbia Newspapers, Inc.*, 286 S.C. 116, 333 S.E.2d 337, 338 (1985), and in New Jersey, *State in the Interest of D.B.*, 181 N.J. Super. 586, 439 A.2d 94, 100 (Juv. & Dom. Rel. Ct. 1981).

First Amendment required that "this presumption cannot be conclusive." Rather, "[t]he public . . . must be given an opportunity to show that the state's or juvenile['s] interest in a closed hearing is not 'overriding' or 'compelling,'" 322 S.E.2d at 238. *Accord In re N.H.B.*, 769 P.2d 844, 849 (Utah Ct. App. 1989).

The conflict reflected in these decisions is ripe for resolution. The issue has been litigated for more than a decade, and the decision of the Ohio Supreme Court in this case raises the question of access to juvenile proceedings squarely, without any procedural obstacles or material qualifications. In order to clarify the governing constitutional standards, the Court should grant certiorari, and resolve the First Amendment question in this case.

C. The Ohio Supreme Court's Decision That The First Amendment Has No Application To Standards Governing Closure Of Juvenile Proceedings Is Incorrect

Certiorari also is warranted because the decision below is incorrect. The Ohio Supreme Court has determined that the First Amendment has no application to proceedings in juvenile court, a ruling that cannot be reconciled with this Court's decisions.

Press-Enterprise II established a two-part inquiry to determine whether the public has a First Amendment right of access to a particular proceeding: (1) "whether the place and process have historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8. The Ohio Supreme Court's application of this constitutional inquiry is flawed.

First, the Ohio Supreme Court concluded that "[j]uvenile proceedings are usually private," App. 17a, solely on

the basis of dicta from three cases: *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *In re Oliver*, 333 U.S. 257 (1948); and *In re Agler*, 19 Ohio St. 2d 70, 249 N.E.2d 808 (1969). Taken on their own terms, these cases fail to establish that juvenile courts historically have been closed to the public. *Smith v. Daily Mail Publishing*, for example, involved a West Virginia statute criminalizing the publication of the name of a juvenile offender. The court ruled that the State's interest in confidentiality "must be subordinated" to the First Amendment right of the press to publish lawfully obtained information. 443 U.S. at 104. The Ohio Supreme Court relied not on this holding, but on a reference to the existence of state statutes "that provide in some way for confidentiality," *id.* at 105, and on the concurring opinion of then-Justice Rehnquist, who explained the State's interest in preserving the confidentiality of the juvenile's *name* to maximize the chances of successful rehabilitation. *Id.* at 107 (Rehnquist, J., concurring). Neither opinion in *Smith* addressed the issue of press access to *proceedings* in juvenile court; indeed, Justice Rehnquist's concurrence noted that "[t]he press is free to describe the details of the defense and inform the community of the proceedings against the juvenile." *Id.* at 108 (Rehnquist, J., concurring).[10]

Even overlooking this flaw, the Ohio Supreme Court's "analysis" is not the historical assessment of actual practices for a particular category of proceedings that is called for by this Court's First Amendment jurisprudence. *See Press-Enterprise II*, 478 U.S. at 8. Indeed,

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[10] In similar fashion, *In re Oliver* contains only a passing reference that juvenile court proceedings "are often conducted without admitting all the public" in the course of holding that a Michigan statute allowing a judge to summarily jail witnesses for contempt violated due process. 333 U.S. at 266 n.12. *In re Agler* similarly contains only a passing reference to "non-public" hearings in juvenile court, in deciding the proper standard of proof for charges of delinquency. 19 Ohio St. 2d at 73, 249 N.E.2d at 811.

since it relied in substantial part on statements made by this Court in cases from other States, the Ohio Supreme Court's analysis is not a careful evaluation of practices in Ohio, but rather a determination that juvenile courts in every State should be exempt from the First Amendment right of access to judicial proceedings.[11]

Second, the Ohio Supreme Court's assertion that "[c]ustody proceedings in the juvenile court would benefit little from public access," relies only on the court's own view that "[c]ustody disputes generally require the courts to delve into the private relations of parents and children," and that public "curiosity" about such matters "does not necessarily translate into a significant positive public role." App. 19a. This superficial analysis ignores the substantial, recognized role of public access in ensuring the fairness of the judicial process and the public's confidence in that process, both of which are as essential to the proper "functioning" of juvenile courts as they are to any other court. *See Richmond Newspapers*, 448 U.S. at 596; *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).

Indeed, the relative informality of juvenile proceedings, coupled with the wide discretion typically exercised by juvenile courts, magnifies the importance of protecting public access as a check on potential abuses. Juvenile courts possess the extraordinary authority to sever the parent-child relationship and control the disposition of

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[11] Had the Ohio Supreme Court focused on the actual historical record, it may well have reached a different result. As the court itself later concluded in developing its statutory standard for closure, juvenile courts in Ohio are not presumptively closed. App. 21a. The proceedings in this case illustrate the point; until the guardian ad litem moved for closure, all proceedings in the custody action had been open to the public and the press. Indeed, some of the judges involved had granted interviews to the press about the case. *See generally In re Gault*, 387 U.S. 1, 24 (1967) ("This claim of secrecy [of juvenile proceedings], however, is more rhetoric than reality.").

children. The potential for abuse of such powers directly correlates with the relatively high degree of discretion the law affords the court in exercising them. *See In re Gault*, 387 U.S. at 18 ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").[12]

Similarly, the discretionary power exercised by juvenile courts underscores the importance of promoting public confidence in their integrity through public scrutiny. Indeed, the tragic facts of this case illustrate the inability of juvenile courts to achieve their mission of protecting the best interests of the child when that confidence is lacking. Ms. Seymour's decision to shoot Mr. Reams reportedly stemmed from her loss of confidence in the integrity of the proceedings, a loss that no doubt was aggravated by the complete veil of secrecy imposed by Judge Solove and affirmed by the Ohio Supreme Court. *Cf. Morgan v. Foretich*, 521 A.2d 248. As the Court observed in *Richmond Newspapers*, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572.[13]

The Ohio Supreme Court's First Amendment analysis simply missed the mark. In relying on out-of-context snippets from unrelated decisions, as well as its own view of the public's interest in juvenile proceedings, the

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[12] As Dean Roscoe Pound warned: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts." Foreword to Young, *Social Treatment in Probation and Delinquency* at xxvii (1937).

[13] *Accord Wideman v. Garbarino*, 770 P.2d at 324 ("Closed or private hearings . . . tend to create suspicion about the [juvenile] court's operation."); 6 J. Wigmore, *Evidence* § 1834(2)(c) (Chadbourne rev. 1976) ("Not only is respect for law increased . . ., but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.").

court misconceived the nature of this Court's First Amendment jurisprudence and sanctioned closure whenever juvenile court judges, in their virtually unfettered discretion, decide closure is appropriate.[14]

Moreover, complete rejection of the First Amendment's applicability is not necessary to accommodate the special concerns that the Ohio Supreme Court associated with juvenile proceedings. This Court's First Amendment jurisprudence is sufficiently flexible—allowing access to be denied where an overriding interest is found to require closure—to take account of the unique nature of juvenile proceedings. *See Press-Enterprise I*, 464 U.S. at 510. By tossing the First Amendment aside, the Ohio Supreme Court not only misapplied this Court's decisions and worsened a conflict in the lower courts, it eliminated all of the protections developed in connection with the qualified right of access. Thus, in Ohio, access to juvenile courts is purely a matter of statute, with no constitutional requirement of articulated findings or placement of the burden of proof, no mandatory consideration of less restrictive alternatives, and no independent review of the record. *See generally id.* at 509-510. This com-

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[14] In permitting only abuse-of-discretion review of a juvenile court judge's closure decision, the Ohio Supreme Court abrogated its First Amendment obligation to undertake an independent review of the record. *See In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989) ("*de novo* review of such closure orders . . . is mandated by their constitutional implications"); *Barron v. Florida Freedom Newspapers*, 531 So.2d 113, 118-19 (Fla. 1988) ("the presumption of openness continues through the appellate review process, and the party seeking closure continues to have the burden to justify closure"). *See generally Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Craig v. Harney*, 331 U.S. 367, 373 (1947). *But see Publicker Indus., Inc. v. Cohen*, 733 F.2d at 1060 (abuse-of-discretion standard); *Morgan v. Foretich*, 528 A.2d 425, 427 n.3 (D.C. Ct. App. 1987) (same); *Associated Press v. Bradshaw*, 410 N.W.2d 577, 579 (S.D. 1987) (same, noting a conflict on the issue).

plete rejection of all First Amendment safeguards is unwarranted and should be corrected by this Court.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT GAG ORDERS ON TRIAL PARTICIPANTS ARE SUBJECT TO FIRST AMENDMENT STANDARDS

The Ohio Supreme Court approved the gag order barring trial participants from discussing the proceedings in public. This Court has never had occasion to explicate the constitutional standards applicable to such gag orders. Two years ago, in dissenting from the denial of certiorari in *Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988), Justice White, joined by Justices Brennan and Marshall, noted "the importance of this issue and the conflicting resolutions given it by the courts of appeals." With the decision below, the lower courts have become more fractured, heightening the need for review. Accordingly, this Court should grant certiorari to resolve the conflict and review the Ohio Supreme Court's decision.

A. The Constitutional Validity Of Gag Orders On Trial Participants Is An Important Issue That Has Not Been, But Should Be, Addressed By This Court

This Court has never addressed the constitutional standards for gag orders on participants in a judicial proceeding; few decisions have even touched on the issue. In *Sheppard v. Maxwell*, 384 U.S 333 (1966), the Court in dicta referred to gag orders as one of the measures the trial court could have used to prevent the "carnival atmosphere at trial," but did not address the First Amendment limitations on such orders. *Id.* at 358-61.[15]

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[15] Later in the opinion, the Court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with pub-

Ten years later, in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the Court addressed the constitutionality of gag orders imposed directly on the media. Applying the prior restraint doctrine's heavy presumption, the Court held that a gag order based on the trial court's finding that "'a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial'" was invalid under the First Amendment. *Id.* at 563 (emphasis in original). The Court noted the potential constitutional challenges to gag orders on "lawyers" and "witnesses," and expressly reserved the question, stating that "[w]e are not now confronted with such issues." *Id.* at 564 & n.8; *see also id.* at 601 n.27 (Brennan, J., concurring).

The propriety of gag orders on trial participants is an important constitutional issue. Whether the proceeding is criminal or civil, it may bring with it serious consequences—including loss of liberty or property—for the participants. Denying them the ability to communicate with the public about the proceedings therefore constitutes a "serious restraint[] on expression." *Gulf Oil v. Bernard*, 452 U.S 89, 104 n.21 (1981).[16] This Court should now explain the First Amendment standards that must be met to warrant such prior restraints on speech.

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licity." 384 U.S. at 363. Some courts have erroneously characterized *Sheppard* as supporting application of this "reasonable likelihood" test to gag orders on trial participants.

[16] In *Gulf Oil*, the Court held that an order restricting the plaintiffs and their counsel from contacting potential class members was "an abuse of discretion," carefully noting that it did "not decide what standards are mandated by the First Amendment in this kind of case." 452 U.S. at 104 n.21.

B. The Lower Courts Have Developed Conflicting Standards To Measure The Constitutional Validity Of Gag Orders On Trial Participants

The majority of Federal courts of appeals to address the issue have found a gag order on trial participants to be a "prior restraint on speech, that carries with it 'a heavy presumption against its constitutional validity.'" *Bailey v. Systems Innovations, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam)). *See United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987); *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473-78 (5th Cir. 1980) (*en banc*), *aff'd on other grounds*, 452 U.S. 89 (1981); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970). *Accord Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327, 1336-37 (1986). Under the majority approach, a trial court can restrain parties from making extrajudicial comments only if the record contains specific findings establishing: (1) that the proscribed speech poses a "clear and present danger" or a "serious and imminent threat" to the administration of justice; (2) that the order is "narrowly drawn" to restrain only that speech which poses such a threat; and (3) that "reasonable alternatives" having "a lesser impact on First Amendment freedoms" are not available. *See, e.g., Bernard v. Gulf Oil Co.*, 619 F.2d at 473-78. *See generally Nebraska Press*, 427 U.S. at 571 (Powell, J., concurring).

The Fourth Circuit has rejected the majority approach. Instead, that court construes *Sheppard* and *Nebraska Press* to authorize prior restraint of extrajudicial comments to the media by "potential witnesses" in a criminal proceeding so long as there is "a reasonable likelihood the defendants would be denied a fair trial without" the gag order. *In re Russell*, 726 F.2d 1007, 1010 (4th Cir.), *cert. denied*, 469 U.S. 837 (1984); *Central South Carolina Chapter, Society of Professional Journalists v. United*

States District Court, 551 F.2d 559, 562 n.3 (4th Cir. 1977). *Accord Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988).[17]

The Second and Ninth Circuits have taken a divided approach to the issue, sometimes utilizing the majority analysis, and sometimes not. Specifically, these Circuits have developed a two-tiered approach. When a trial participant objects to the gag order, the majority analysis is applied and the order is "properly characterized as a prior restraint." *See In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied sub nom. Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988); *Levine v. United States District Court*, 764 F.2d 590, 595 (9th Cir. 1985). When a gag order is challenged only by the media, however, the Second and Ninth Circuits diverge from the majority approach. In such circumstances, they refuse to treat the gag order as a prior restraint; instead, these courts subject the gag order to a less exacting standard of scrutiny under the First Amendment. *See In re Application of Dow Jones & Co.*, 842 F.2d at 608-10; *Radio & Television News Ass'n v. United States District Court*, 781 F.2d 1443, 1446-47 (9th Cir. 1986).[18]

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[17] The Fourth Circuit also has held that members of the media do not have standing to challenge a gag order on trial participants. *See Central South Carolina Chapter, Society of Professional Journalists v. Martin*, 556 F.2d 706, 708 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). *Accord KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431, 439-42 (1984). That ruling squarely contradicts the holdings of the Sixth and Tenth Circuits. *See Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1235-36 (10th Cir. 1986); *CBS, Inc. v. Young*, 522 F.2d at 237-38.

[18] The two courts apply slightly different standards. In *Dow Jones* the Second Circuit adopted a "reasonable likelihood standard based on an inapposite portion of *Sheppard*. *See supra* note 15. The Ninth Circuit, in contrast, has adopted a standard from Chief Justice Burger's dissent in *Globe Newspaper*, ruling the court "need only 'examine whether the restrictions imposed are reasonable and whether the interests [of the government] override the very limited

In this case, the Ohio Supreme Court established yet another approach to the issue, exempting gag orders on trial participants in juvenile cases from *any* limitations imposed by the First Amendment. Although the court acknowledged that gag orders "are effectively prior restrainst on the litigants," it dismissed this Court's prior restraint jurisprudence simply by asserting that such orders "have been frequently used" by trial courts. App. 28a. The court then evaluated the gag order under the *statutory* standard it had chosen for closure decisions—a standard that contains no presumption at all against the imposition of prior restraints on speech. App. 28a.[10]

The alleged frequency of gag orders cannot justify ignoring the standards required by the First Amendment for their use. The alleged frequency of such orders does, however, underscore the need for the Court to consider their constitutionality, an issue of considerable importance that for more than two decades has generated extensive litigation and conflicting decisions. *See Dow Jones & Co. v. Simon*, 488 U.S. at 946 (White, J., dissenting from denial of certiorari).

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incidental effects of the [order] on First Amendment rights.'" *Radio & Television News Ass'n*, 781 F.2d at 1447 (quoting *Globe Newspaper*, 457 U.S. at 616 (Burger, C.J., dissenting)) (insertions in original).

[19] The Ohio Supreme Court also implied that a First Amendment analysis of the gag order was unnecessary because a juvenile court "is not presumptively open," App. 21a. Even if the court's premise were true, the conclusion is fallacious. A prior restraint on the speech of participants in a governmental proceeding is subject to First Amendment limitations, even if the proceeding is exempt from the constitutional right of public access. *See Butterworth v. Smith*, 110 S. Ct. 1376 (1990) (State statute prohibiting grand jury witness from disclosing to the public the substance of his grand jury testimony violated First Amendment).

C. The Court Should Establish That The First Amendment Prohibits The Use Of A Gag Order On Trial Participants Solely On The Basis Of A Finding That The Restrained Speech "Could" Cause Harm

Certiorari is particularly appropriate here because, if the decision to impose a gag order on the parties had been measured against the correct constitutional yardstick, it would not have been sustained. Although the Ohio Supreme Court found "a reasonable and substantial basis for believing" that Ms. Seymour's efforts to invite public scrutiny of the proceedings "*could* psychologically harm Tessa," App. 30a (emphasis added), that finding does not satisfy the First Amendment requirement of "a serious and imminent threat" to an overriding governmental interest that only a gag order can prevent. For example, in *Illinois v. Summerville*, 190 Ill. App. 3d 1072, 547 N.E.2d 513 (1989), a custody case involving a three-year old alleged victim of sexual abuse, the court held a gag order on the parties violated the First Amendment, and rejected a claim that it "was reasonable to prevent future harm and embarrassment to" the child: "A finding of 'possibilities,' even if present, is not sufficient to support a conclusion that a serious threat or imminent threat to the administration of justice exists." [20]

Equally inadequate is the Ohio Supreme Court's finding that public scrutiny "*could* endanger the fairness of the adjudication." App. 30a (emphasis added). The Ohio

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[20] *See also In re Kowalski*, 16 Media L. Rep. (BNA) 2018, 2019 (Minn. Ct. App. 1989) ("The protection of vulnerable litigants in civil proceedings is insufficient to justify broad restraints on the dissemination of information which has been lawfully obtained"); *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W. 2d 433, 435 (Minn. Ct. App. 1985) ("The court could have ordered the guardian to restrict the child's access to newspapers, radio, and television news programs. Given this simple alternative to a gag order, we do not believe the juvenile court's order would have been appropriate in any circumstance.").

Supreme Court found "nothing in the record to suggest that [Judge] Solove would be swayed by Seymour's efforts" to invite media coverage; instead, the court was concerned that "other parties" would risk "damage to personal reputations" if they chose not to "defend[] themselves in the media." App. 30a. As this Court recently reaffirmed, however, "absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth v. Smith*, 110 S.Ct. 1376, 1382 (1990). *See generally Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978).

Moreover, neither Judge Solove nor the Ohio Supreme Court considered the effectiveness of a gag order in preventing the possibility of harm to Tessa or to the reputation of other parties. Given the detailed, national exposure already given to the facts of this case and the limited duration of the gag order on the parties—it expired at the end of the proceedings—the gag order was inherently incapable of effectively preventing the possible harms identified by the court.[21] Instead, the gag order did nothing but aggravate Ms. Seymour's distrust of the judicial process.

Finally, the record on which the Ohio Supreme Court based its findings contained only general testimony and speculation that applies with equal force to *any* custody dispute. If constitutionally sufficient in this case, this record calls for blanket gag orders on trial participants in *all* judicial proceedings involving newsworthy custody disputes, rendering meaningless the "heavy presumption

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[27] *See Nebraska Press*, 427 U.S. at 567 ("plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it"); *id.* at 571 (Powell, J., concurring) ("a restraint may not issue unless it is also shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious"); *In re Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989) (closure order was "constitutionally impermissible" where it would not prevent publicity).

against [the] constitutional validity" of prior restraints under the First Amendment. *New York Times*, 403 U.S. at 714. *See also Nebraska Press*, 427 U.S. at 561 ("[I]t is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.").

This Court should review the Ohio Supreme Court's decision in order to confirm that gag orders on trial participants must be subjected to the constitutional analysis required by the First Amendment, and thereby prevent future courts from routinely imposing such orders on the basis of generic evidence and findings that apply with equal force to any newsworthy judicial proceeding.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF OHIO

Nos. 89-1302 and 89-1303

IN RE T.R., A JUVENILE.

THE STATE, *ex rel.* DISPATCH PRINTING COMPANY,
Appellee,

v.

SOLOVE, JUDGE, *et al.*,
Appellants.

Appeals from the Court of Appeals for Franklin County
Nos. 89AP-331, 89AP-332 and 89AP-323

Submitted February 21, 1990

Decided June 13, 1990

Courts—Interlocutory orders of trial court restricting public access to pending litigation are not final, appealable orders—Prohibition—Standing of press and public seeking access to closed court proceeding—"Open courts" provision of Section 16, Article I, Ohio Constitution, construed—Juvenile court proceedings may restrict public access to proceedings, when.

O.Jur 3d Trial § 103.

1. Interlocutory orders of a trial court restricting public access to pending litigation are not final, appealable orders, and may be challenged during the pendency of the litigation only through an action for a writ of prohibition. Members of the press and public who seek access to a closed court proceeding have standing to seek a writ of prohibition for this purpose. (*State, ex rel. Dayton Newspapers, Inc.*, v. *Phillips* [1976], 46 Ohio St. 2d 457, 75 O.O. 2d 511, 351 N.E. 2d 127, paragraphs one and two of the syllabus, applied and followed.)

O.Jur 3d Constitutional Law § 524.

2. The "open courts" provision of the Ohio Constitution, Section 16, Article I, creates no greater right of public access to court proceedings than accorded by the Free Speech and Free Press Clauses of the First Amendment to the United States Constitution and the analogous provisions of Section 11, Article I, of the Ohio Constitution. These provisions create a qualified right of public access to proceedings which have historically been open to the public, and in which public access plays a significant positive role. (*Press-Enterprise Co.* v. *Superior Court* [1986], 478 U.S. 1, followed; *State, ex rel. The Repository*, v. *Unger* [1986], 28 Ohio St. 3d 418, 28 OBR 472, 504 N.E. 2d 37, explained.)

O.Jur 3d Family Law § 504.

3. Proceedings in juvenile court to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child, are neither presumptively open nor presumptively closed to the public. The juvenile court may restrict public access to these proceedings pursuant to Juv. R. 27 and R.C. 2151.35 if the court finds, after hearing evidence and argu-

ment on the issue, (1) that there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the adjudication, and (2) the potential for harm outweighs the benefits of public access.

These cases challenge a judgment of the court of appeals invalidating a court-closure order and a gag order entered in a consolidated dependency and custody action now pending in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. The court proceedings stem from a complex and unique set of facts surrounding the birth of a little girl, Tessa Annaleah Reams.

In 1982, Richard Reams utilized a firm known as the Association for Surrogate Parenting Services, Inc. to contact one Norma Lee Stotski, who agreed to act as a "surrogate mother" and bear Reams's child by artificial insemination in return for $10,000. As is customary in such arrangements, see *In the Matter of Baby M* (1988), 109 N.J. 396, 410, 537 A. 2d 1227, 1234, Stotski agreed to surrender custody of the child to Reams at birth and consent to adoption by Reams's wife Beverly, n.k.a. Beverly Seymour.

Stotski gave birth to Tessa on January 12, 1985. Soon after, the Reamses took custody of Tessa. They failed to formalize Tessa's adoption by Seymour. Approximately one year later, Reams and Seymour divorced.

Reams, Seymour and Stotski each sought permanent custody of Tessa. During the next three years, the parties contested Tessa's parentage and custody in the courts of three different counties. Genetic tests performed during the litigation revealed that Tessa's biological father is Leslie Miner, a friend of Stotski's who agreed to act as a donor when attempts at artificial insemination with Reams's semen failed. The dispute over custody of Tessa was the subject of newspaper articles in the Delaware

Gazette and the Columbus Dispatch, a newspaper published by relator-appellee, Dispatch Printing Company ("the Dispatch"), during 1987.

The action which gave rise to the instant case is pending in the juvenile court before respondent-appellant, Judge Ronald L. Solove. It is a consolidation of two cases: a custody only proceeding and a proceeding to have Tessa declared a dependent child.[1] Reams, Seymour, Stotski and Miner are parties to this consolidated action. It appears that Reams and Seymour are sharing custody of Tessa pending resolution of the underlying custody and dependency cases.

In January 1989, Seymour sent copies of a homemade press release, entitled "Mother in Fact[2] Battles Surrogate for Child," to several newspapers and surrogate parenting groups. The release, which related Seymour's position on the merits of the dispute, included a photograph of Tessa and a plea for contributions to a "legal fund."

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[1] The dependency proceeding was apparently initiated by Tessa's guardian ad litem, while the custody proceeding was initiated *pro se* by Seymour. The court below was puzzled as to "how there could be a guardian ad litem filing the action prior to the appointment of the guardian ad litem in the specific case." Additionally, for reasons which have never been articulated by the parties, Tessa and her guardian ad litem are apparently represented by separate counsel. Resolution of the instant case does not require clarification of these peculiarities.

Further, a third case is pending in the probate court which involves Tessa. Both Reams and Seymour filed petitions to adopt Tessa in 1988. These petitions were dismissed by the probate court, but the dismisssal as to Reams was reversed on appeal and the case was remanded for further proceedings. *In re Adoption of Reams* (Dec. 7, 1989), Franklin App. No. 89AP-169, unreported. A motion to certify the record was denied by this court in case No. 90-219.

[2] Seymour refers to herself as Tessa's "Mother in Fact." The parties do not dispute that Tessa herself considers Seymour to be her mother, though she has no legal or biological relationship to Tessa.

The release generated media interest. The New York Times and the Dispatch ran extensive articles accompanied by photos. A six-page story appeared in People magazine. A weekly tabloid newspaper, Star, ran a full-page feature entitled "Who Owns Baby Tessa?" which described the child as "legally nobody's." It was accompanied by a sidebar inviting readers to submit proposed solutions "in less than 50 words" to what the article described as "a cruel tangle of love with an innocent child in the middle." Seymour was interviewed by a reporter and camera crew from Fox Television. She was also scheduled to appear on the syndicated "Geraldo" talk show.

Apparently in response to Seymour's media contacts, Tessa's guardian ad litem and counsel for Tessa moved for a so-called "gag order" enjoining the parties from communicating with the press and public concerning Tessa or the consolidated action.[3] Seymour was the only party to oppose the motion. The Fox Television camera crew, which had interviewed Seymour, was permitted to photograph the hearing. A representative of Fox made a statement in opposition to the motion. A Dispatch reporter also attended the hearing, but did not participate.

Seymour testified that her purpose in contacting the media was to use public opinion to influence the outcome. "I am doing everything I can as her mother to strengthen my position," she said. In her opinion, increased public attention would benefit Tessa. The court also heard testimony from Stotski that she, too, was considering an appearance on "Geraldo."

Dr. Jo Ann King, a licensed clinical psychologist, testified to the effects of media attention on children involved

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[3] The parties were apparently already subject to an earlier order enjoining them from providing photos of Tessa to representatives of the media or allowing Tessa to be photographed or interviewed. This order was not challenged in the court below, and consequently is not at issue.

in custody disputes. Dr. King did not meet with or evaluate Tessa or any of the other parties. She based her opinion on professional experience. According to Dr. King, a child who is the subject of a custody dispute is already in a difficult position and faces a "[h]igh probability" of emotional harm. Substantial publicity about the custody dispute would increase the probability of harm. She concluded that substantial publicity is always contrary to the best interests of the child involved.

After hearing testimony, Judge Solove entered identical orders in each of the consolidated cases. The orders enjoin the adult parties, their attorneys, and agents from "disseminating any information about this pending cause or about the minor child Tessa Reams to any and all persons * * * including, but not limited to, representatives of both the broadcast and print media; and * * * from appearing on any and all radio and television broadcasts regarding these causes or the minor child herein; and * * * from otherwise providing any information regarding these causes or said child either directly or indirectly in any fashion whatsoever."

The guardian ad litem and Tessa's counsel also filed a motion seeking, *inter alia*, to close the courtroom to the press and public and to seal the record of the case. Counsel for the Dispatch participated in the hearing on this motion and presented testimony, though the Dispatch was not formally joined as a party.

Tessa's counsel called Jamie Schmerbeck, a social worker assigned to Tessa's case, as an expert witness. Schmerbeck testified that media coverage of the court proceedings would not be in Tessa's best interest because it would increase the chance that Tessa could be exposed to "negative allegations" concerning Reams's or Seymour's fitness as a parent. Counsel for Tessa argued that the presence of the news media would place him and Tessa's guardian ad litem in "an untenable position" because they might be required to either withhold sensi-

tive evidence from the court or risk psychological harm to Tessa from its disclosure.

David Ferguson, managing editor of the Dispatch, testified on the benefits of press access to the proceedings.

In a written opinion, Judge Solove found that "the interests in protecting Tessa Reams and in a full judicial exploration of all relevant evidence bearing on her best interest in the custody dispute are overriding and the presumption in favor of openness is overcome in this case. * * *" He ordered that "the trial and all other proceedings in this matter shall be closed to all news media and members of the public, except parties, witnesses * * *, counsel, and necessary court personnel. * * *" Access to the case file was similarly restricted.

The Dispatch appealed both the gag order and the closure order to the Court of Appeals for Franklin County. The Dispatch also sought a writ of prohibition in the same court, seeking to prevent Judge Solove from enforcing the orders. The guardian ad litem intervened as a respondent in the prohibition action.

The court below held that the Dispatch had standing to appeal the closure order (which the court determined to be a final, appealable order) and to seek a writ of prohibition to prevent enforcement of both orders, but had no standing to directly appeal the gag order. On the merits, the court held both orders unconstitutional because the evidence did not demonstrate that media access presented a substantial probability of harm to Tessa, and that the orders, therefore, unduly limit the exercise by the Dispatch of its right to access. The court issued a writ of prohibition precluding Judge Solove from enforcing either order.

Tessa's guardian ad litem and Judge Solove filed an appeal as of right from the writ of prohibition as case No. 89-1303. In addition, the guardian filed a motion to certify the record in the appeal from the closure order

as case No. 89-1302. We granted this motion, *In re T.R.* (1989), 46 Ohio St. 3d 716, 546 N.E. 2d 1334, and consolidated the cases.

This cause is before the court pursuant to the allowance of a motion to certify the record in case No. 89-1302 and on an appeal as of right in case No. 89-1303.

Jones, Day, Reavis & Pogue, John W. Zeiger, Robert W. Hamilton and *Steven J. McDonald,* for appellee.

S. Michael Miller, prosecuting attorney, and *Jeffrey Glasgow,* for appellant Judge Ronald Solove.

James Kura, public defender, *Paul Skendelas, Delligatti, Hollenbaugh, Briscoe & Milless* and *Charles K. Milless,* for appellant Tessa Reams.

Baker & Hostetler, David L. Marburger and *Susan M. Gilles,* urging affirmance for *amici curiae,* Ohio Newspaper Assn. et al.

Beverly Seymour, pro se, urging affirmance as *amicus curiae.*

S. Farrell Jackson, urging reversal for *amicus curiae,* Ohio Association of Juvenile and Family Court Judges.

Harry R. Reinhart, urging reversal for *amicus curiae,* Ohio Association of Criminal Defense Lawyers.

Benesch, Friedlander, Coplan & Aronoff and *Stephen D. Williger,* urging reversal for *amici curiae,* Federation for Community Planning et al.

H. BROWN, J. This case presents a question of first impression for us: what standard should be applied by a juvenile court judge in ruling on motions to restrict public access to custody and dependency proceedings? The restrictions in the instant case take two forms: a "closure order" which bars the public from attending the trial, and a so-called "gag order" which prohibits the adult parties from discussing the case, and thus indirectly

restricts public access by depriving the media of a source of news.

For the reasons which follow, we find that the orders issued by appellant Judge Solove were, with some modification, supported by the evidence under the standard which we herein adopt.

I

PROCEDURAL ISSUES

The Dispatch and the court below appear to have been uncertain of whether an appeal or a writ of prohibition should be used to seek review of the closure and gag orders. Extraordinary writs, such as the writ of prohibition, are not available to review a trial court's actions when the party seeking the writ has a plain and adequate remedy at law by way of an appeal. See *DuBose* v. *Trumbull Cty. Court of Common Pleas* (1980), 64 Ohio St. 2d 169, 171-172, 18 O.O. 3d 385, 387, 413 N.E. 2d 1205, 1208. Here, however, the Dispatch has no remedy by way of an appeal. Interlocutory closure and gag orders are not final, appealable orders. Though they involve substantial rights, they do not determine the action and prevent a judgment in favor of a party to the action. See R.C. 2505.02. While the parties themselves may ultimately appeal from the trial court's final judgment and assign as error the imposition or nonimposition of a closure or gag order, see *State, ex rel. Fyffe*, v. *Pierce* (1988), 40 Ohio St. 3d 8, 531 N.E. 2d 673, the Dispatch cannot do so because it is not a party to the action. Even if the Dispatch did have standing to appeal from the final judgment, it would not have an adequate remedy because the proceeding to which it seeks access would be over before the appeal could be taken.

Our cases have long held that prohibition is an appropriate remedy to prevent enforcement of an order improperly restricting the access of press and public to court proceedings. *State, ex rel. Dayton Newspapers,*

Inc., v. *Phillips* (1976), 46 Ohio St. 2d 457, 75 O.O. 2d 511, 351 N.E. 2d 127, paragraph one of the syllabus; see, also, *State, ex rel. Beacon Journal Publishing Co.*, v. *Kainrad* (1976), 46 Ohio St. 2d 349, 75 O.O. 2d 435, 348 N.E. 2d 695; *State, ex rel. The Repository*, v. *Unger* (1986), 28 Ohio St. 3d 418, 28 OBR 472, 504 N.E. 2d 37. Because its right to gather news and its right to attend a public proceeding are impaired by such an order, the press has standing to bring an action in prohibition to challenge its validity. See *Dayton Newspapers, supra*, at paragraph two of the syllabus; *Repository, supra*, at 419, 28 OBR at 473, 504 N.E. 2d at 39.[4] Accordingly, we reaffirm our prior decisions and hold that interlocutory orders of a trial court restricting public access to pending litigation are not final, appealable orders, and may be challenged during the pendency of the litigation only through an action for a writ of prohibition. Members of the press and public who seek access to a closed court proceeding have standing to seek a writ of prohibition for this purpose.

II

THE STANDARD FOR DETERMINING PUBLIC ACCESS TO JUVENILE COURT PROCEEDINGS

The parties vigorously disagree on whether Judge Solove applied the correct standard and properly allocated the burden of proof when deciding to close the courtroom and place the parties under a gag order. The disagreement is complicated by the fact that Judge Solove appears to have used two different standards. In

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[4] While challenges to restrictions on access to courtrooms are typically brought by journalists acting as *de facto* representatives of the public, nothing prevents persons other than journalists from assuming this role. See *Barron* v. *Florida Freedom Newspapers, Inc.* (Fla. 1988), 531 So. 2d 113, 118.

pronouncing his decision on the gag order from the bench, he said, "So long as there is a scintilla of possibility of harm to the child, this Court will restrict the rights of the adults involved. And it is clear to me that there is at least a real possibility that the continued attention to this matter will result in harm to the child." In the written opinion on the closure order, the judge stated that there was "a presumption in favor of the openness of all judicial proceedings" which could only be overcome "where a competing, overriding interest is found to exist and the preservation of that overriding interest necessitates invasion of the first amendment rights * * *."

The precise question before us has not been passed upon by either this court or the United States Supreme Court; however, questions of the public's constitutional right of access to court proceedings in criminal prosecutions have been the subject of several decisions. We begin our discussion with a review of the case law.

A The Public's Constitutional Right of Access to Judicial Proceedings in Criminal Prosecutions

In *Press-Enterprise Co.* v. *Superior Court* (1986), 478 U.S. 1 (*"Press-Enterprise II"*), the United States Supreme Court, following a line of cases beginning with *Richmond Newspapers, Inc.* v. *Virginia* (1980), 448 U.S. 555, held that there is a federal constitutional right of access to proceedings in a criminal prosecution which have "historically been open to the press and general public" and in which "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II, supra,* at 8. "* * * If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. * * *" *Id.* at 9. The proceeding is presumed open to the press and public. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is es-

sential to preserve higher values and is narrowly tailored to serve that interest. * * *" *Press-Enterprise Co.* v. *Superior Court* (1984), 464 U.S. 501, 510 ("*Press-Enterprise I*"). A case-by-case determination on the necessity of closure is required. *Globe Newspaper Co.* v. *Superior Court* (1982), 457 U.S. 596, 607-608.

After reviewing the relevant authorities, we have concluded that the *Press-Enterprise II* test of "experience and logic" accurately defines the limits of constitutionally protected public access to all court proceedings. See *Cincinnati Gas & Elec. Co.* v. *General Elec. Co.* (C.A.6, 1988), 854 F.2d 900, certiorari denied *sub nom. Cincinnati Post* v. *General Elec. Co.* (1989), 489 U.S. ——, 103, L. Ed. 2d 229, 109 S. Ct. 1171 (using *Press Enterprise II* test to determine public right of access to civil case). Accordingly, we adopt this test and hold that the public's qualified right of access attaches to those hearings and proceedings in all courts which have historically been open to the public, and in which public access plays a significant positive role.[5]

B The Right of Public Access Under the Open Courts Provision of the Ohio Constitution

In *State, ex rel. The Repository,* v. *Unger, supra,* we recognized that a qualified right of access is also embraced by Section 16, Article I, of the Ohio Constitution,[6] the "open courts" provision of our Bill of Rights.

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[5] Our decision in *State, ex rel. Plain Dealer Publishing Co.,* v. *Hamilton Cty. Court of Common Pleas* (1989), 44 Ohio St. 3d 602, 542 N.E. 2d 1102, is not inconsistent with this view. See *Richmond Newspapers, supra,* at 580, fn. 17; Comment, The First Amendment Right of Access to Civil Trials After *Globe Newspaper Co.* v. *Superior Court* (1984), 51 U. Chi. L. Rev. 286, 294-298.

[6] This provision states in pertinent part:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Public access to criminal trials is also supported by the constitutional right of the accused to a public trial. "The underlying premise of a public trial is that the public is a party to all criminal proceedings. Criminal cases are prosecuted in the name of the people because crimes are public wrongs affecting all members of society.* * *" *Id.* at 420, 28 OBR at 474 504 N.E. 2d at 39.

The Dispatch and its supporting *amici* argue that the "open courts" provision creates a qualified right of public access to *all* court proceedings, a broader right than that embraced by the free speech provisions of the First Amendment and Section 11, Article I of the Ohio Constitution. On the other side, appellants and their supporting *amici* contend that the open courts provision creates no presumption of public access to proceedings which have historically been closed.

Though the open courts provision has been a part of our Constitution since Ohio was admitted to the Union, we cannot resolve this issue by reference to the debates and comments of the drafters. The records of the 1802 convention indicate that the original open courts provision, Section 7, Article VIII, Constitution of 1802, was enacted without amendment or discussion. See *E.W. Scripps Co.* v. *Fulton* (1955), 100 Ohio App. 157, 171-172, 60 O.O. 147, 155, 125 N.E.2d 896, 908 (Hurd, J., concurring). At the 1850-1851 convention, this section was carried into the current Bill of Rights unchanged, *id.* at 172, 60 O.O. at 155, 125 N.E.2d at 906, and without discussion relating to the question of public access.[7]

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[7] According to the convention record:

"[Convention delegate] MR. RANNEY said he perceived that the [Standing] Committee [on the Preamble and Bill of Rights] had left out of this report a number of articles in the old bill of rights. He had copied one of them, and would move its adoption as an additional section, as follows:

" 'Sec. ——. That all courts shall be open, and every person, for any injury done him, in his lands, goods, person, or reputation, shall

The 1873-1874 constitutional convention made no changes in this section, and the 1912 convention also left the words of the 1802 drafters unaltered, though it added a sentence not at issue in the instant case. *Id.*

We also cannot resolve this issue by simplistically viewing the phrase "[a]ll courts shall be open" as an absolute command applicable in all courts in all situations. It is a hallmark of American constitutional jurisprudence that many provisions of our Constitutions, though phrased in absolute terms, do not create absolute rights. For example, though the First Amendment's guarantee of freedom of speech is phrased in absolute terms, it "would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *United States* (1919), 249 U.S. 47, 52. Nor would it protect a seller of obscene material, *Roth* v. *United States* (1957), 354 U.S. 476, or one who defames another with actual malice, *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254.

Certain phases of Ohio court proceedings—such as grand jury hearings, petit jury deliberations, conferences in chambers, the issuance of search warrants, and the conferences of collegial courts such as ours—have been closed to the public both before and after the adoption of our Constitution.

For example, the grand jury has been used in Ohio criminal jurisprudence since the first Court of General Quarter Sessions was held in Marietta in 1788. A His-

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have remedy by the due course of law, and right and justice administered without denial or delay.'

"MR. HITCHCOCK of Geauga, had no objection, to the amendment, if it could be carried out. Justice should certainly be administered without denial or delay, but delay could not possibly be avoided in the Courts, unless they could have a gag-law there, as well as in this body. [A laugh.]

"The section was agreed to." 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio (1851) 337.

tory of the Courts and Lawyers of Ohio (1934) 51-52. Grand jury hearings were closed to public access in the days of the English common law, 1 LaFave & Israel, Criminal Procedure (1984) 602-603, Section 8.2(a), and have remained presumptively closed to this day, *see Petition for Disclosure of Evidence* (1980), 63 Ohio St. 2d 212, 17 O.O. 3d 131, 407 N.E. 2d 513. If the drafters had intended the open courts provision to create an absolute right of public access, these grand jury proceedings could not be closed to the public.

The Dispatch relies heavily for its support on our *per curiam* opinion in *Repository, supra.*[8] In that case, we reviewed the propriety of orders restricting press access to pretrial hearings in two separate murder prosecutions in the common pleas court. (The court below erroneously stated in its opinion that *Repository* involved a juvenile delinquency proceeding.) Consistently with the United States Supreme Court's opinions in *Press-Enterprise I* and *II*, we held that the public's qualified right of access extends to pretrial proceedings in criminal cases. *Repository, supra*, at 421, 28 OBR at 475, 504 N.E. 2d at 40.

Repository did not find a public right of access to criminal prosecutions any greater than that derived from the First Amendment in *Richmond Newspapers* and *Press-Enterprise I* and *II*. While our opinion did not limit its holding to criminal prosecutions, it also makes no mention of non-criminal proceedings, except for a concurring opinion which notes that "[t]here are * * * functions of

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[8] The Dispatch also cites *State* v. *Lane* (1979), 60 Ohio St. 2d 112, 14 O.O. 3d 342, 397 N.E. 2d 1338. In *Lane*, we held that a criminal trial conducted within the walls of a prison violated the defendant's rights to due process and a fair public trial. *Id.* at paragraphs one and two of the syllabus. While we did cite the open courts provision in a footnote, *id.* at 119, 14 O.O. 3d at 347, 397 N.E. 2d at 1343, fn. 2, our opinion was concerned with the abridgment of the *defendant's* right to a public trial, and did not discuss the *public's* right to attend.

the judicial system which * * * do not come within the realm of the constitutional guarantee of open courts. Grand jury sessions, the exclusion of witnesses during trial, jury deliberations, conferences of collegial courts, and certain juvenile hearings are some of these. * * *" *Repository*, *supra*, at 425 28 OBR at 479, 504 N.E. 2d at 43 (Celebrezze, C.J., concurring).

We conclude that the open courts provision of the Ohio Constitution creates no greater right of public access to court proceedings than that accorded by the Free Speech and Free Press Rights Clauses of the First Amendment to the United States Constitution and the analogous provisions of Section 11, Article I of the Ohio Constitution.

C Application of the *Press-Enterprise II* Balancing Test to Dependency and Custody Proceedings in Juvenile Courts.—

The juvenile court as we know it today did not exist at common law, though it has roots in the common-law doctrine of *parens patriae*, which made the courts of chancery responsible for the protection of infants. Whitlatch, The Juvenile Court—A Court of Law (1967), 18 Case W. Res. U. L. Rev. 1239, 1241; see, also, Young, A Synopsis of Ohio Juvenile Court Law (1962), 31 U. Cin. L. Rev. 131, 133. The first juvenile court in Ohio was established in Cuyahoga County by the General Assembly in 1902. *In re Agler* (1969), 19 Ohio St. 2d 70, 73, 48 O.O. 2d 85, 87, 249 N.E. 2d 808, 810; *Young*, *supra*, at 135. Subsequent enactments in 1904 and 1906 created a statewide system of specialized juvenile courts. *Agler*, *supra*, at 73, 48 O.O. 2d at 87, 249 N.E. 2d at 810; *Young*, *supra*, at 135. The juvenile court was originally created to deal with children who violated criminal laws, see, generally, Whitlatch, *supra;* Young, *supra*, but its jurisdiction has expaned to include, *inter alia*, children who are abused, neglected, or dependent, and to determine the custody of any child not a ward of another court of the state. R.C. 2151.23(A).

Juvenile courts differ significantly from courts of general jurisdiction. The mission of the juvenile court is to act as an insurer of the welfare of children and a provider of social and rehabilitative services. R.C. 2151.01; *McKeiver* v. *Pennsylvania* (1971), 403 U.S. 528, 546, fn. 6, and at 551-552 (White, J., concurring); *In re Gault* (1967), 387 U.S. 1, 15-16; *Kent* v. *United States* (1966), 383 U.S. 541, 554-555; *In re M.D.* (1988), 38 Ohio St. 3d 149, 153, 527 N.E. 2d 286, 289-290; *Agler*, *supra*, at 73, 48 O.O. 2d at 87, 249 N.E. 2d at 810-811; Whitlatch, *supra*, at 1241. Consequently, juvenile courts have adopted unique methods of conducting their proceedings. Hearings are informal, and based on an inquisitorial model rather than an adversarial one. R.C. 2151.35; *State* v. *Shardell* (1958), 107 Ohio App. 338, 340-341, 8 O.O. 2d 262, 264, 153 N.E. 2d 510, 512; Pound, The Place of the Family Court in the Judicial System (1964), 10 Crime and Delinquency 532, 542; Whitlatch, *supra*, at 1246-1247; see, also, *McKeiver*, *supra*, at 545 (juvenile procedure is based on "the idealistic prospect of an intimate, informal protective proceeding"). Juvenile proceedings are usually private. *Smith* v. *Daily Mail Publishing Co.* (1979), 443 U.S. 97, 105; *id.* at 107 (Rehnquist, J., concurring); *In re Oliver* (1948), 333 U.S. 257, 266, fn. 12; *Agler*, *supra*, at 73, 48 O.O. 2d at 87, 249 N.E. 2d at 811. Juvenile court records are confidential. Juv. R. 37(B); see, also, Juv. R. 32(B) (mental and physical examinations of children pursuant to court order may not be used for other purposes); R.C. 2151.18(B) and (C) (those juvenile court records which are open to the public shall not include the identity of any party to a case); R.C. 5153.17 (records of investigations by public children's services agencies on abused, neglected, and dependent children are confidential); *Gault*, *supra*, at 25 ("there is no reason why, consistently with due process, a State cannot continue * * * to provide and to improve provision for the confidentiality of records * * * relating to juveniles").

The United States Supreme Court has repeatedly recognized that juvenile court proceedings have historically been closed to the public. *Smith, supra,* at 105 ("all 50 states have statutes that provide in some way for confidentiality" in juvenile proceedings); *Davis* v. *Alaska* (1974), 415 U.S. 308, 319 (state has an interest "to seek to preserve the anonymity of a juvenile offender"); *Kent, supra,* at 556 (juvenile offenders are "shielded from publicity" by statute). Further, it seems clear that public access to such proceedings does not *necessarily* play a positive role in the juvenile court process.

With regard to delinquent children, "* * * it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' * * *" *Gault, supra,* at 24. A delinquent child is not considered a criminal, and the civil disabilities ordinarly following a criminal conviction do not attach. *Gault, supra; Agler, supra,* at 73, 48 O.O. 2d at 87, 249 N.E. 2d at 811. A delinquent child who has successfully been rehabilitated may apply to have the record of his case sealed, R.C. 2151.358(D), and the court may order that "the proceedings in which the person was adjudicated a delinquent * * * child be deemed never to have occurred. * * *" R.C. 2151.358(E).

The need for confidentially is even more compelling in the case of a child who is abused, neglected, or dependent. The delinquent child is at least partially responsible for the case being in court; an abused, neglected, or dependent child is wholly innocent of wrongdoing. While the public arguably has an interest in delinquency proceedings which is analogous to its interest in criminal proceedings, see *Repository, supra,* at 420, 28 OBR at 474, 504 N.E. 2d at 39 (public has qualified right of access because "the public is a party to all criminal proceedings"), this interest is not present in abuse, neglect, and dependency proceedings. Additionally, the effectiveness of the statutes and rules mandating confidentially of the records of

juvenile courts and children's services agencies would be destroyed if the public were allowed access to the proceedings in which the confidential records are generated.

Custody proceedings in the juvenile court would benefit little from public access.[9] Custody disputes generally require the courts to delve into the private relations of parents and children. While curiosity may be incited by custody cases involving bizarre facts or famous persons, this does not necessarily translate into a significant positive public role. "* * * [W]e perceive a clear distinction between mere curiosity, or the undeniably morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and real public or general concern on the other." (Emphasis deleted.) *Firestone* v. *Time, Inc.* (Fla. 1972), 271 So. 2d 745, 748.

We do not suggest that the public has no legitimate interest in obtaining access to juvenile proceedings, or that public participation does not play a signficant positive role in the juvenile court process. As with all operations of government, the public has an interest in scrutinizing the working of the juvenile court. *In the Matter of N.H.B.* (Utah App. 1989), 769 P. 2d 844, 849. Public access to the juvenile court process can promote informed public involvement in government and enhance public confidence in the judicial branch. *Id.* at 851. These are important interests which should be considered before any juvenile judge decides to restrict public access to the courtroom. However, given the General Assembly's selection of a system of juvenile courts which depends for its

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[9] We refer here *only* to those custody proceedings initiated in the juvenile court pursuant to R.C. 2151.23(A)(2). Most child custody adjudications are made by the domestic relations court as part of a divorce or dissolution of marriage. While we need not decide the question today, we note that other courts have held that divorce actions, like other adult civil actions, are presumptively open to the public. See, *e.g.*, *Barron*, *supra*, at 118-119.

effectiveness on confidentially, these interests are not sufficient to create a *presumption* of openness.

Accordingly, we conclude that there is no qualified right of public access to juvenile court proceedings to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child.

D The Standard for Restricting Press Access to Dependency and Custody Proceedings in Juvenile Courts.

Having determined that there is no presumption in favor of public access and, consequently, that the "overriding interest" test of *Press-Enterprise I* does not apply, we must decide what standard should be used to balance the public's interest in access against the parties' interest in confidentiality.

We look first to the relevant provisions of the Revised Code and the Rules of Juvenile Procedure. R.C. 2151.35 (A) provides that "* * * [i]n the hearing of any case, the general public *may* be excluded and only those persons admitted who have a direct interest in the case." (Emphasis added.) Nearly identical language is found in Juv. R. 27. In *State, ex rel. Fyffe*, v. *Pierce, supra*, we held that these provisions authorize, but do not require, closure of the hearing. This is in contrast to the statutes governing adoptions and involuntary hospitalization for mental illness, which mandate a closed hearing. R.C. 3107.17(A) (adoption: "All hearings * * * shall be held in closed court * * *."); 5122.15(A)(5) (mental illness: "The hearing shall be closed to the public unless counsel for the respondent, with the permission of the respondent, requests that the hearing be open * * *."). Though the General Assembly has clearly adopted a policy of confidentiality in the juvenile courts, it has not expressly mandated closure of juvenile hearings.

We need not decide the General Assembly's constitutional authority to enact a statute making juvenile court

proceedings presumptively closed. However, we note that courts in four states with open courts provisions similar to ours in their constitutions have held presumptive closure statutes to be constitutional. *In the Matter of Adoption of H.Y.T.* (Fla. 1984), 458 So. 2d 1127 (adoption proceedings); *Courier-Journal* v. *F.T.P.* (Oct. 27, 1989), Ky. App. Nos. 88-CA-1489-MR and 88-CA-1490-MR, unreported, petition for review denied (April 18, 1989), Ky. Supreme Ct. No. 89-SC-874-MR (juvenile proceedings); *Ex parte Columbia Newspapers, Inc.* (S.C. 1985), 333 S.E. 2d 337 (juvenile proceedings presumptively closed unless challenged); *In the Matter of N.H.B., supra* (juvenile hearings); see, also, *F.T.P.* v. *Courier-Journal* (Ky. 1989), 774 S.W. 2d 444 (closure statute permits press to be excluded from appellate level of juvenile proceedings). Courts in four other states have upheld presumptive closure statutes governing juvenile hearings against First Amendment challenges. *Florida Publishing Co.* v. *Morgan* (1984), 253 Ga. 467, 322 S.E. 2d 233; *State in the Interest of D.B.* (1981), 181 N.J. Super. 586, 439 A.2d 94; *Edward A. Sherman Publishing Co.* v. *Goldberg* (R.I. 1982), 443 A. 2d 1252; *In re J.S.* (Vt. 1981), 438 A. 2d 1125; see, also, *In the Matter of Robert M.* (Family Ct. 1981), 109 Misc. 2d 427, 439 N.Y. Supp. 2d 986 (juvenile court rule providing for selective exclusion of press at judge's discretion is constitutional).

In the absence of a statute, we conclude that juvenile court proceedings to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child, are neither presumptively open nor presumptively closed to the press and public.

Because there is no presumption, the juvenile court must, in each case, weigh the competing interests for and against public access. As we have said, the public has an important interest in observing the working of the juvenile court. Access can promote informed public dis-

cussion and lead to more intelligent responses to problems and issues.

On the other hand, public access to juvenile court proceedings may have harmful effects. When the evidence presented at a juvenile hearing is given wide coverage in the press, the effectiveness of the confidential records statutes and rules is weakened. Public access has the potential to endanger the fairness of the proceedings or disrupt the orderly process of adjudication. Finally, intense publicity surrounding the events which have brought a child into the juvenile court may psychologically harm the child, making it more difficult, if not impossible, for the child to recover from those events. See *Smith*, *supra*, at 108, fn. 1 (Rehnquist, J., concurring).

Harmful psychological effects are difficult to measure, and nearly impossible to predict. Thus, the "substantial probability" standard articulated by the court below would render the juvenile court powerless to shield a child from threatened psychological harm. Due to the inexact nature of modern psychological science, this standard effectively requires that the child suffer measurable harm before the court can act. While the public's interest in access is important and deserving of protection, the state also has a compelling interest in the protection of children. *State* v. *Young* (1988), 37 Ohio St. 3d 249, 257, 525 N.E. 2d 1363, 1372. The "substantial probability" standard gives insufficient weight to this interest, leaving the juvenile court unable to prevent an innocent child from being made a public spectacle and being psychologically maimed by the very process which is intended to help the child.

On the other hand, we decline to adopt the "scintilla of possibility of harm" standard used by Judge Solove in his gag order ruling, or the "best interests of the child" standard advanced by appellants and their supporting *amici*. The nature of the misfortunes which

bring children to the juvenile court are such that there is almost always a "scintilla of possibility of harm to the child" from public access. Further, given the policies behind the juvenile court's lengthy history of confidentiality, it is possible to reasonably argue that public access is *never* in any child's best interest. We believe these standards give insufficient weight to the public's interest in access.

A proper standard is one which gives due deference to both the limitations of our ability to predict harmful consequences which may result from public access and the public's interest in learning about and scrutinizing the working of the juvenile court. Accordingly, we hold that the juvenile court may restrict public access to its proceedings in abuse, neglect, dependency and custody cases pursuant to Juv. R. 27 and R.C. 2151.35 if, after hearing evidence and argument on the issue, it finds that: (1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and (2) the potential for harm outweighs the benefits of public access.

III

VALIDITY OF THE ORDERS ISSUED IN THE INSTANT CASE

The restrictions on public access imposed by Judge Solove in the instant case were of two types. The closure order barred the public, including the media, from attending the trial or inspecting the records of the case. The earlier gag order enjoined the adult parties from discussing the case with others, and thus indirectly restricted public access by depriving the media of a source of news.

A The Closure Order

Because the closure order imposes a greater restriction on public access than the gag order, see *Richmond News-*

papers, *supra*, at 581, we discuss it first. At the outset, we dispose of two subsidiary issues.

First, Juv. R. 37(B) prohibits public use of juvenile court records by any person except for purposes of appeal or with leave of court. That portion of the closure order pertaining to the case records does nothing more than restate the restriction found in Juv. R. 37(B). The validity of this rule has not been challenged, either here or in the courts below.

Second, the Dispatch and its supporting *amici* contend that a prior restraint bears a "heavy presumption" against its constitutional validity, as held in *Organization for a Better Austin* v. *Keefe* (1971), 402 U.S. 415, 419. The closure order, however, is not a prior restraint. A prior restraint occurs when the state attempts to prohibit the broadcasting or publication of material already in the possession of the media. *Florida Freedom Newspapers, Inc.* v. *McCrary* (Fla. 1988), 520 So. 2d 32, 35. The closure order does not prohibit anyone from publishing information already obtained.[10] It acts only to keep the Dispatch from being present at a place and time where it would be able to gather more information. A restriction on the ability to gather news is not a prior restraint.

Passing these preliminary points, we address the merits of the closure order. Jamie Schmerbeck, a social worker who had direct contact with Tessa, testified that media coverage of the court proceedings would not be

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[10] The original motion for closure included a provision asking the court to establish "limitations on * * * the use of the minor's name and physical description and other information regarding the child." Counsel for the Dispatch pointed out that this appeared to be an attempt to impose restrictions on the use of information already in the possession of the media. After counsel for Tessa disclaimed any attempt to impose a prior restraint, the court and counsel agreed to proceed with the understanding that no prior restraint would be sought or imposed.

in Tessa's best interest. Schmerbeck asserted that continued publicity would increase the chance that Tessa could be exposed to "negative allegations" concerning Reams's or Seymour's fitness as a parent. "She [Tessa] believes that both of those parties are her parents, and it doesn't take an expert to say that children are protective of their parents and that they love their parents. It would be very confusing to her to hear any negative testimony in the sense of her parents." Schmerbeck conceded that some harm might already have occurred as a result of previous press coverage, or might occur even if there were no press coverage, but concluded that "the more exposure there is, * * * the greater the possibility of harm * * *."

The Dispatch attacks this testimony on two fronts. It first argues that Schmerbeck's testimony is insufficient to establish a substantial probability of harm to Tessa. While this may be true, we have held, *supra*, that the evidence need only show that there exists a reasonable and substantial basis for believing that public access harm Tessa. Based on the unrebutted testimony of Schmerbeck, an expert who has had direct contact with Tessa, we conclude that a sufficient showing has been made.[11]

The Dispatch also contends that even if publicity would harm Tessa, the media coverage which preceded the closure and gag orders was so pervasive that it is too late for the court to protect her. The Supreme Court of Vermont rejected a similar argument in a case involving a juvenile accused of a highly publicized rape-murder, the details of which—including the child's name—had

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[11] The testimony of Dr. King at the gag order hearing would also tend to support this conclusion; however, Judge Solove denied a motion by Reams's counsel to supplement the record of the closure order hearing with the transcript of Dr. King's testimony. This testimony cannot, therefore, be considered part of the record for purposes of evaluating the closure order.

been "flagrantly publicized" before his delinquency hearing. We find merit in the Vermont court's observations that this argument would let "the news media determine which juvenile proceedings will be open to the public by turning up the volume of publicity concerning any case which strikes their fancy. * * * [D]ecisions to open proceedings will then be based, not on the child's needs, but on chance circumstances. * * *" *In re J.S., supra,* at 1130; see, also, *State in the Interest of D.B., supra,* at 592, 439 A. 2d at 98.

We are also persuaded by the argument of Tessa's counsel that the presence of the media would place him and the guardian ad litem in "an untenable position" when deciding what evidence to present. They would be forced to weigh the psychological harm to Tessa posed by the disclosure of evidence against the value of evidence needed to support her case. For example, there are psychological evaluations of Tessa and the adult parties who seek custody of her. These reports will constitute an important part of the evidence to be presented at trial. Public disclosure of these evaluations has the potential of harming Tessa. The Dispatch contends that Judge Solove need not close the entire trial to accommodate these concerns, but no proposal for a workable "less restrictive" alternative has been demonstrated.

Further, we can see that concern for the effect on Tessa would burden a lawyer's conscience as he questions the witnesses. A lawyer should be free of such extraneous conflicts of interest. This is especially so in this case, where one of the parties has announced an intent to try her case in the media. When the guradian must make strategic trial decisions based upon the potential psychological harm to his ward caused by the presence of the public, the fairness of the adjudication is endangered.

Balanced against the interest of Tessa, there are arguments in favor of a public trial. The opportunity is

presented to study the potential pitfalls of surrogacy contracts. Discussion of the case might help resolve the question of whether to enforce such contracts. The public would be educated in the decision-making processes of the juvenile court. Since Judge Solove is an elected official, the public has a right to observe and evaluate his performance in office. Finally, the media have a legitimate interest in reporting the details of a newsworthy and emotionally charged story. These interests are entitled to weight in the balancing process.

Closure decisions are to be made by the trial judge on the totality of the circumstances. That decision should withstand review unless the trial judge has abused his or her discretion in applying the standard we have set. Balancing the possibility of psychological harm to Tessa and the threat to a full exploration of the relevant evidence posed by a media-exploited public trial of Tessa's tragic situation against the public access interests, we conclude Judge Solove did not abuse his discretion in ordering a closure. Accordingly, we reverse that portion of the court of appeals' judgment which prohibits Judge Solove from enforcing the closure order.

B The Gag Order

The gag order enjoins the adult parties and their counsel from communicating any information about Tessa or the custody litigation. While this order does not impose a prior restraint on the *press*, see, *e.g.*, *Central Carolina Chapter, Society of Professional Journalists* v. *Martin* (D.S.C. 1977), 431 F. Supp. 1182, affirmed as modified (C.A. 4, 1977), 556 F. 2d 706, certiorari denied (1978), 434 U.S. 1022, it does limit the *parties'* freedom to disseminate information already in their possession. However, "[t]he phrase 'prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. * * *" *Kingsley Books, Inc.* v. *Brown* (1957), 354 U.S. 436, 441. Gag orders are considered a less restrictive alter-

native to restrictions imposed directly on the media. See *Nebraska Press Assn.* v. *Stuart* (1976), 427 U.S. 539, 564. In the presumptively *open* atmosphere of the adult criminal or civil trial, orders which are effectively prior restraints on the litigants have been frequently used to protect the criminal defendant's right to a fair trial, *e.g.*, *Nebraska Press*, *supra*, at 564; *Sheppard* v. *Maxwell* (1966), 384 U.S. 333, 361; *Florida Freedom Newspapers, Inc.* v. *McCrary* (Fla. App. 1986), 497 So. 2d 652, 657, affirmed (Fla. 1988), 520 So. 2d 32, and to secure a litigant's confidentiality interest in information subject to civil discovery, *e.g.*, *Seattle Times Co.* v. *Rhinehart* (1984), 467 U.S. 20 (protective order prohibiting defendant newspaper from publishing confidential material obtained from plaintiff in libel action); *Triangle Ink & Color Co., Inc.* v. *Sherwin-Williams Co.* (N.D. Ill. 1974), 61 F.R.D. 634 (protection of trade secrets), and the privacy interests of parties to sensational cases, *e.g.*, *S.N.E.* v. *R.L.B.* (Alaska 1985), 699 P. 2d 875 (child custody case involving lesbian mother; order found to be overbroad); *Mason* v. *Reiter* (Fla. App. 1988), 531 So. 2d 348 (parternity action involving famous comedian; contempt citation for violation of gag order technically defective). We conclude that a juvenile court, which is not presumptively open, has the power to control extrajudicial comments by the litigants, provided the restrictions are consistent with the standards we have set.

The motion for the gag order was apparently made in response to the media attention aroused by Beverly Seymour's home-made press release. Seymour has stated that her objective was to use public opinion to influence the outcome of the case. She feels she is at a disadvantage in this litigation, representing herself *pro se* and "lacking money, power, [and] position[.]" She considers media attention "her only trump card * * *." In Seymour's view, publicity favorable to her cause would benefit Tessa: "She is never going to be harmed or have a

hair on her head affected if millions of people are looking out for her best interests, as is her mother."

Norma Stotski testified that she, too, was scheduled to appear on "Geraldo." Stotski felt compelled to respond to Seymour in the press "to protect myself and my own image," though she would have preferred to avoid publicity. Richard Reams did not testify, but his counsel said that Seymour's statements to the press had placed him in a difficult position. Counsel stated that Reams believed "it would be in the child's best interests to refrain from comments to any media," but found it difficult to refrain from responding to "Ms. Seymour's attempt to get public opinion on her side."

Dr. Jo Ann King, a clinical psychologist, testified that a child who is the subject of a custody dispute is already in a difficult position and faces a "[h]igh probability" of emotional harm. She stated that the effect varies with age and maturity, and tends to be worse with younger children. In Dr. King's opinion, substantial publicity about the custody dispute would heighten the probability of harm. Dr. King explained that this is because "[a] young child has a tendency to see the world normally from an egocentric point of view, which means that a young child takes responsibility for things that are going on around them much beyond what they have control of or input to; so that when they are surrounded with intense interest being focused on their being, they can't sort that out, but take responsibility for it." She concluded that substantial publicity is contrary to the best interests of a child involved in a custody dispute.

The evidence establishes that Seymour was engaged in a campaign to intensify media coverage of the custody dispute. Given the unrebutted expert testimony of Dr. King that intensive coverage of custody disputes is detrimental to children, and the sensationalist tone of some of the reporting, there is a reasonable and substantial

basis for believing that public access could psychologically harm Tessa.

The evidence also establishes a reasonable and substantial basis for believing that Seymour's media campaign could endanger the fairness of the adjudication. "The very purpose of a court system is to adjudicate controversies * * * in the calmness and solemnity of the courtroom according to legal procedures. * * *" *Cox* v. *Louisiana* (1965), 379 U.S. 559, 583 (Black, J., concurring in part and dissenting in part). "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. * * *" *Bridges* v. *California* (1941), 314 U.S. 252, 271.

We find nothing in the record to suggest that Judge Solove would be swayed by Seymour's efforts to marshal public opinion. However, the parties have been placed in the position where they must choose between defending themselves in the media (thereby increasing the possibility of harm to Tessa) or risking damage to personal reputations and to the rights of the litigants.[12]

These interests must again be balanced against the public's interest in observing Judge Solove's courtroom and the media's right to gather news. We find that Judge Solove did not abuse his discretion in deciding to impose a gag order.

We agree with appellee, however, that the order itself is overbroad and should be redrawn. Judge Solove enjoined the parties from "disseminating *any* information * * * about the minor child Tessa Reams to *any and all* persons * * * and * * * from otherwise providing *any* information regarding * * * said child either directly or

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[12] While we have criticized Seymour's media campaign and believe that it is not in Tessa's best interests, we express no opinion on the sincerity of Seymour's motives. We caution the parties, and the courts which will decide Tessa's fate, that we intend no adverse comment on Seymour's fitness as a parent.

indirectly in any fashion whatsoever." (Emphasis added.) Taken literally, the order prohibits the parties and their counsel from discussing the case with one another. It forbids Reams and Seymour, who are sharing custody of Tessa, from discussing her welfare with each other, Tessa's teacher, or a pediatrician. It prohibits Seymour, a non-lawyer who is litigating the case *pro se*, from hiring counsel or otherwise seeking assistance in presenting her case.

Judge Solove could not have intended to restrict the parties to this extent. We believe he sought only to prevent the parties from "trying the case in the media." Judge Solove can, on the existing record, fashion an order which will preserve the fairness of the legal proceedings involving Tessa without unduly restricting the parties and their counsel. Accordingly, we modify the judgment of the court below to direct it to issue a new gag order consistent with the standards we have set forth.[13]

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[13] To accomplish such a goal, resort to the Code of Professional Responsibility adopted by this court may be helpful. In formulating DR 7-107 of the Code, thoughtful consideration was given to restrictions against publicity-generating extrajudicial statements.

The Code applies to counsel and not to the parties. However, the provisions of DR 7-107 provide a checklist of relevant considerations where a trial judge has decided to impose a gag order which will apply to non-attorneys.

DR 7-107(G) states:

"A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from a reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) Evidence regarding the occurrence or transaction involved.

"(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

"(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

[Continued]

IV

CONCLUSION

In case No. 89-1302, we hold that there is no final appealable order and reverse the judgment of the court of appeals.

In case No. 89-1303, we reverse the judgment granting a writ of prohibition insofar as it prohibits enforcement of the closure order. We modify that part of the writ of prohibition governing the gag order as follows: a limited writ is hereby granted directing the trial court to vacate its orders of February 21, 1989, and issue new orders in their place consistent with the standards contained in our opinion. If no new order is issued within thirty days of the release of this opinion, a writ prohibiting enforcement of the orders of February 21, 1989 shall issue.

Judgment reversed in part,
affirmed in part,
and modified.

MOYER, C.J., SWEENEY, HOLMES, WRIGHT and RESNICK, JJ., concur.

DOUGLAS, J., concurs in part and dissents in part.

DOUGLAS, J., concurring in part and dissenting in part. I concur in paragraph one of the syllabus of the majority and the discussion supporting paragraph one as found in Part I of the majority opinion. However, because I believe that it is our responsibility to apply the law to each citizen in each case and arrive at an appropriate

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[13] [Continued]

"(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

"(5) Any other matter reasonably likely to interfere with a fair trial of the action."

decision, and, because I believe the majority has not done so in this case, I must vigorously, but respectfully, dissent.

It is my judgment that today this court commences a dangerous journey down a murky road when it sanctions the closing of courtrooms in Ohio and the issuing and enforcing of gag orders. While my distaste, given the applicable constitutional provisions, as I interpret them, for *any* courtroom closure or gag order continues unabated, I am particularly alarmed by the majority's assertion that it has "followed" *Press-Enterprise Co.* v. *Superior Court* (1986), 478 U.S. 1, and has "explained" *State, ex rel. The Repository,* v. *Unger* (1986), 28 Ohio St. 3d 418, 28 OBR 472, 504 N.E. 2d 37. My guess is that those persons involved in those cases would not recognize what today the majority says the cases stand for.

It is my view that those cases have interpreted the First Amendment to the United States Constitution (*Press-Enterprise*) and Section 16, Article I of the Ohio Constitution (*Unger*). They stand for principles that have been well-established and recognized, to wit: that any party seeking to close a courtroom (or secure a gag order) must, as an initial step, demonstrate a "substantial *probability*" that a "higher value" will suffer prejudict "by publicity that closure would prevent." Further, the cases stand for the proposition that there must also be a showing that there are no reasonable alternatives to closure that can adequately protect the higher value.

A *unanimous* court of appeals found these principles to be in full force and effect and further found that the extensive closure and gag orders of the trial court did not meet the applicable standards. The judgment of the court of appeals should be affirmed and the writ of prohibition should issue.

A majority of this court has, in the past, made salutary advances in protecting First Amendment freedoms

and has taken a steadfast course of ensuring that the public has access to government records and that meetings of public bodies be open to the public. As such, I once believed that this court would be recognized for our achievements in these areas for some time to come. However, rather than continuing to take strides forward in protecting these precious rights, this court has recently taken significant steps backward in these areas by eroding First Amendment freedoms and the public's right to know. See, *e.g.*, *State, ex rel. Polovischak*, v. *Mayfield* (1990), 50 Ohio St. 3d 51, 552 N.E. 2d 635; *Tasin* v. *SIFCO Industries, Inc.* (1990), 50 Ohio St. 3d 102, 553 N.E. 2d 257; *State, ex rel. Hastings Mut. Ins. Co.*, v. *Merillat* (1990), 50 Ohio St. 3d 152, 553 N.E. 2d 646; *State, ex rel. McGee*, v. *Ohio State Bd. of Psychology* (1990), 49 Ohio St. 3d 59, 550 N.E. 2d 945; and *State, ex rel. Scanlon*, v. *Deters* (1989), 45 Ohio St. 3d 376, 544 N.E. 2d 680. See, also, *State, ex rel. Mazarro*, v. *Ferguson* (1990), 49 Ohio St. 3d 37, 550 N.E. 2d 464. By today's decision, those seemingly modest backward steps have matured into a giant step backward in the never-ending battle to assure that the rights of all people guaranteed by the First Amendment to the Constitution of the United States and Sections 11 and 16, Aricle I of the Ohio Constitution are preserved.

In upholding the constitutionality of the closure order, the majority sanctions restrictions on the liberty of the press by restricting the rights of the public (including the press) to attend trials. Further, by directing Judge Solove to issue a new gag order, the majority sanctions restrictions on the liberty of speech, and of the press.

Section 16, Article I of the Ohio Constitution provides in relevant part:

"*All courts shall be open, and* every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have

justice administered without denial or delay." (Emphasis added.)

The comma which follows the word "open" clearly demonstrates that Section 16, Article I requires all courts to be open to everyone regardless of whether or not the person seeking access to the courts has been injured. By interpreting Section 16, Article I differently, the majority has obviously chosen to ignore its clear and unambiguous language. In my judgment, Section 16, Artile I is an absolute command that all courts are to be open in all circumstances and to all people (including the press).

The majority says that interpreting Section 16, Article I to mean what it says is "simplistic." I agree! "Simplistic" is defined as: "* * * of, relating to, or characterized by simplism * * *, and "simplism" is defined as: "* * * the tendency to concentrate on a single aspect (as of a problem) to the exclusion of all complicating factors * * *[.]" Webster's Third New International Dictionary (1986) 2122. The language and intent of Section 16, Article I is clear and there is nothing complicated about it. In Ohio, the courts must remain open. On one point, the majority is correct. The original open courts provision (Section 7, Article VIII, Constitution of 1802) was enacted without amendment or discussion. Likewise, the provision was not debated or changed at the 1850-1851 convention where it was placed into the current Bill of Rights. Further, at neither the 1873-1874 nor the 1912 convention were the original words of the drafters altered. I suggest that there was nothing about the open courts provision to discuss because the provision means exactly what it says. Section 16, Article I is a simplistic provision of our Constitution (concentrating on one problem—the tendency to close courthouse doors) and it is entitled to a simplistic interpretation.

Section 11, Article I of the Ohio Constitution provides in relevant part:

"*Every citizen may freely speak,* write, *and publish his sentiments* on all subjects, being responsible for the abuse of the right; *and no law shall be passed to restrain or abridge the liberty of speech, or of the press.* * * *" (Emphasis added.)

It is difficult to imagine anything more clear than the language of Section 11, Article I (except, perhaps, the language of Section 16, Article I).

In my judgment, the closure order issued by Judge Solove is violative of Section 16, Article I and Section 11, Article I of the Ohio Constitution. Not only does the order abrogate the public's right to access the courtroom, but also effectively takes away the media's ability to gather the news. Thus, it can hardly be said that the closure order does not restrain or *abridge* the liberty of the press.

Similarly, the gag order issued by Judge Solove abridges the rights of consenting adults to speak freely to one another (as in *Tasin, supra*) and not only seals the lips of the parties and their lawyers, but effectively seals the lips of the media by taking away its ability to gather the news. As such, the gag order restrains and abridges the liberty of speech, and of the press, in violation of Section 11, Article I. While I agree with the majority that the gag order is overbroad, I do not agree that Judge Solove should be directed to issue another order which, in my judgment, will just as certainly restrict the liberties guaranteed by Section 11, Article I as does the gag order presently before us.

In promulgating its "guidelines," the majority sanctions the sealing of the records in the case at bar for today (and every avenue of public access to any information concerning the proceedings in this case) and, in doing so, the majority has indicated a willingness to *forever* prohibit all information regarding the proceedings in the case at bar from entering the public realm

(see majority opinion, Section II[C]. The next logical step for the majority to take (given today's decision) will be to deny a writ of mandamus sometime in the future which seeks to compel disclosure of the court records in this case. This mandamus action may ensue long after Tessa is beyond the threat of harm that the majority uses to justify today's decision. In addition, what if it is Tessa who seeks to know? Would the majority "protect" her against herself? This is "Big Brother" operating its it best!

Further, in paragraph three of the syllabus, the majority holds that a juvenile court may restrict public access to certain proceedings if the juvenile court finds, *inter alia*, that the potential for harm if the public is allow access outweighs the benefits of public access. Even if I were to accept such a proposition (which I do not), in my judgment, the benefits of public access outweigh any potential for harm in the case *sub judice*.

The problems associated with surrogate parenting and the custody and dependency actions which may accompany agreements such as the one in the case at bar are of significant public interest. Access to the courts can promote informed public discussion on these matters. Others who are parties (or are considering being parties) to such an agreement should be made aware of the legal and emotional consequences attending certain parenting arrangements. On the other hand, I believe that Tessa can be shielded from those perceived threats associated with allowing the public to access the courtroom and that the case will be decided fairly by Judge Solove regardless of whether the public is allowed access to the proceedings.

Finally, even though there are many other issues and much law on the subject that can be discussed, I confine myself to the majority's argument that not *all* court proceedings are open and, thus, it follows for the

majority, that it is proper to close juvenile courts. As an example, the majority cities grand jury proceedings. Again, the majority misses the mark.

I concede that the "open courts" provision does not apply to certain portions or steps of a judicial proceeding. These would include grand jury and petit jury deliberations and even our conferences as we discuss and decide cases. But these steps do not involve actual *trials*. The grand jury investigates. It does not adjudicate—and there is a world of difference!

Further, appellants argue that adoption proceedings are closed. With regard to adoptions, we have a specific statute, R.C. 3107.17, providing for such hearings to be closed. In contrast, and to me it is a major difference that the drafters of the rule obviously recognized, Juv. R. 27 does not mandate closure but, in fact, presumes that court proceedings will be open to the public. The difference should be obvious.

Concerning the majority's argument that the juvenile courts are somehow different from other courts, I submit that such may be the case but Section 16, Article I of the Ohio Constitution does *not* read, "All courts shall be open—except juvenile courts."

In a concurring opinion in *State, ex rel. Dayton Newspapers*, v. *Phillips* (1976), 46 Ohio St. 2d 457, 471, 75 O.O. 2d 511, 518, 351 N.E. 2d 127, 136, Justice Stern said: "The correction of judicial abuses and the approval of judicial wisdom and integrity depend alike upon the accessibility of the courts to public scrutiny." In a concurring opinion in *E.W. Scripps Co.* v. *Fulton* (1955), 100 Ohio App. 157, 178, 60 O.O. 147, 158, 125 N.E. 2d 896, 909, Judge Hurd said: "* * * Crime and corruption grow and thrive in darkness and secrecy. Justice thrives in the open sunlight of day. If we deny to the public and press access to courts of justice, we foster a system

of jurisprudence heretofore unknown in the history of Ohio."

In the case at bar, we have a unique opportunity to reaffirm these principles for Ohio. I regret we have let the opportunity slip by and, in fact, have seriously diminished, once again, the public's constitutional right to know.

I must respectfully dissent.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 89AP-323

(Regular Calendar)

STATE, *ex rel.* THE DISPATCH PRINTING COMPANY,
Relator,

v.

THE HONORABLE RONALD L. SOLOVE, Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch,
Respondent.

No. 89AP-331

(Regular Calendar)

IN the MATTER of: TESSA REAMS.

(THE DISPATCH PRINTING COMPANY,
Appellant.)

No. 89AP-332

(Regular Calendar)

IN the MATTER of: TESSA REAMS.

(THE DISPATCH PRINTING COMPANY,
Appellant.)

OPINION

Rendered on May 25, 1989

JONES, DAY, REAVIS & POGUE, MR. JOHN W. ZEIGER, MR. ROBERT W. HAMILTON and MR. STEVEN J. McDONALD, for The Dispatch Printing Company.

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. JEFFREY GLASGOW, for Honorable Ronald L. Solove.

DELLIGATTI, HOLLENBAUGH, BRISCOE & MILLESS, and MR. CHARLES K. MILLESS, for Tessa Reams.

MR. JAMES KURA, Franklin County Public Defender, and MR. PAUL SKINDELAS, for guardian ad litem David L. Strait.

MS. PATRICIA L. GRIMM, for Norma Lee Stotski.

MS. FRANCINE JACOBS, for Beverly Seymour.

MS. ANDREA R. YAGODA, for Richard Reams.

MS. SUZANNE SABOL-PHALEN, for Leslie Miner.

IN PROHIBITION and MANDAMUS and APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Division.

WHITESIDE, J.

These three cases were heard simultaneously by this court, cases No. 89AP-331 and 89AP-332 being consolidated and being appeals from two separate orders of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Division, one being a so-called "gag" order and the other a "closure" order.

Case No. 89AP-331 involves a complaint filed by David L. Strait, the guardian ad litem for the minor child named Tessa Annaleah Reams, seeking an order that the child be declared a dependent child and seeking temporary custody or long-term foster care. It is unexplained in the case how there could be a guardian ad litem filing the action prior to the appointment of the guardian ad litem in the specific case.

Case No. 89AP-332 was originally an action brought by Beverly Reams, asserting that she is the wife of one Richard Reams and the "mother-in-fact and primary caretaker of Tessa Annaleah Reams since her date of birth January 12, 1985." It is also alleged that: (a) by a prior order of the Court of Common Pleas of Franklin County, Ohio, Juvenile Division, in another case, Richard Reams "was established as the biological father of Tessa Annaleah Reams and given custody of her"; (b) Norma Lee Stotski is the natural mother of Tessa Aannaleah Reams and consented to both the prior parentage entry and the award of custody to Richard Reams; (c) Richard Reams is in fact not the biological father of Tessa Annaleah Reams and that "the entry establishing him as the father is a total fraud."

The complaint in case No. 89AP-331 contains similar allegations but additionally alleges that Stotski, who is the natural and biological mother of the minor child, in consideration of the promised payment of $10,000, agreed to delive the child to Richard Reams and Beverly Reams, who is also known as Beverly Seymour, and that the Reams have been divorced in the interim.

During the course of the proceedings, the trial court entered a gag order restricting the parties from discussing the issues in the case because of an overabundance of publicity during the course of the proceedings to that time. Although a reporter for *The Columbus Dispatch*, a newspaper published by The Dispatch Printing Company, was present, neither the Dispatch nor other media

was allowed to participate in the hearing, although a representative of Fox Broadcasting was permitted to make a statement. Subsequently, the trial court conducted a second hearing as to whether to close the trial of the case to the public and press, at which The Dispatch Printing Company was allowed to appear and fully participate in the proceedings through their counsel. The Dispatch Printing Company is the appellant in both of the appeals.

In addition, case No. 89AP-323 is an original action in prohibition brought by The Dispatch Printing Company against the trial judge seeking a writ prohibiting the trial judge, respondent herein, from enforcing the gag order and closure order or, alternatively, a writ of mandamus ordering respondent judge to vacate said orders.

All of the parties, including The Dispatch Printing Company (Dispatch) suggest that the orders from which the Dispatch seeks to appeal are not appealable orders. The Dispatch filed both appeals and brought the action in prohibition so as to make sure that the issue would be properly presented to this court whatever the proper procedural stance might be. We shall defer determining the appealability of the orders and whether such an appeal constitutes an adequate remedy precluding prohibition until after we discuss the underlying merit and constitutional issues.

This case has generated substantially greater publicity and media and public interest than the ordinary dependency or custody case because of the unusual factual circumstances involved. The subject of both actions is a child who has been in the care of foster parents[1] since

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[1] We will refer herein to the Reams as foster mother and foster father since that is the most logical and clear method of referring to them. Although there are some statutory provisions for placement of children with foster parents, at common law a foster

birth. Stotski is the natural mother of the child, having been artificially inseminated with sperm, which she and Beverly Reams believed was sperm of which Richard Reams was the donor, but apparently the donor was actually a friend of Richard Reams. Thus, we have a natural mother, Stotski, a foster mother, Beverly Reams, aka Seymour (Seymour), and a foster father, Richard Reams (Reams), who was once thought to be the natural father but is not, and the natural father, a person who apparently has not been an active party in these proceedings. The issue in these proceedings is: What about the poor child?—Who should be awarded custody of her? —Is she somehow a dependent child because of these unusual circumstances? Also involved is the issue of the standing of long-time foster parents and the length of time necessary to establish a familial relationship so as to create some type of parental rights in the foster mother and foster father.

As a result of this natural public interest, both local and national press have published articles concerning the case, including *The Columbus Dispatch*, *The New York Times*, *People Magazine*, and *Star Magazine*.

The complaint in case No. 89AP-331 was not filed until February 17, 1989, and, at the same time that the complaint was filed, the guradian ad litem

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parent was one who nurtured and afforded parental care to a child although not related by blood or legal ties. In some occasions, such parents were referred to as surrogates, but use of that term in this case would be inappropriate since, in another context, a woman who bears a child with the understanding that it will be given to and placed with others to care for as if it were their own child is referred to as a surrogate mother, the situation usually being that the natural mother is artifically inseminated with sperm of the husband of the woman who will become the foster mother, with the intent eventually to adopt the child. There apparently was a contract which could be referred to as a fosterage contract, since fosterage involved a custom of entrusing a child to foster parents to be brought up.

for the minor child in the other case, filed a motion that the parties, the foster mother Seymour, the foster father Reams, the natural mother Stotski, her husband Joseph Stotski, and one Leslie Miner, who is alleged to be the biological and natural father of the child, be enjoined from disseminating any information about the pending custody action or the child to anyone, including representatives of the broadcast and print media, and also be enjoined from appearing on any radio or television broadcasts and from otherwise providing information regarding the case.

The other action, brought by the foster mother, Seymour, fka Reams, was commenced on September 11, 1987, and was pending some seventeen months without decision on the merits at the time the guardian ad litem brought the dependency action. The guardian ad litem filed a similar motion in the Seymour case also on February 17, 1989. The record reflects that the Franklin County Public Defender's Office was appointed guardian ad litem and the present attorney-appointed legal counsel for the minor child on September 22, 1987, and has remained so since.

The record also reflects that the public interest in the case was recognized earlier, and the trial court permitted a television station to televise and record proceedings on September 22, 1987. As late as February 2, 1989, the trial court granted a representative of the *The Columbus Dispatch* permission to view the file in the case. On February 3, 1989, the trial court, however, issued an order enjoining the parties from providing photographs, films, or interviews of Tessa Reams to media representatives and from permitting the child to be photographed, filmed, or otherwise put in contact with any media representative. No issue is presented herein with respect to that order or with the earlier orders allowing the taking of photographs in the courtroom.

The February 27, 1989 entry reads in pertinent part as follows:

> "It is therefore ORDERED that all parties * * * and, all others acting in concert or association with or on behalf of the above * * * are hereby RESTRAINED, PROHIBITED and ENJOINED from disseminating any information about this pending cause or about the minor child Tessa Reams to any and all persons, organizations and entities, including, but not limited to, representatives of both the broadcast and print media; and further all said persons are RESTRAINED, PROHIBITED and ENJOINED from appearing on any and all radio and television broadcasts regarding these causes or the minor child herein; and, all said parties are further RESTRAINED, PROHIBITED and ENJOINED from otherwise providing any information regarding these causes or said child either directly or indirectly in any fashion whatsoever.
>
> "It is further ORDERED that no transcript of this hearing shall be released without the court's permission."

The closure order of March 10, 1989, reads in pertinent part as follows:

> "It is therefore ORDERED that the trial and all other proceedings of this matter shall be closed to all news media and members of the public, except parties, witnesses (subject, of course, to a separation order), counsel, and necessary court personnel. It is further ORDERED that the files and records of this court shall not be examined by the news media or members of the public, other than parties, their counsel, and necessary court personnel, without an order of this court granted after notice to all interested parties and hearing, R.C. 2151.35."

The threshold determination necessarily is the limits and extent of the power of the trial court to issue a gag order or a closure order, specifically in a case pending in

a juvenile branch of the domestic relations division of a common pleas court. Here, two separate proceedings are involved and, conceivably, the proper exercise of judicial power may vary with the proceeding involved, even though both are pending before the same court and judge. For the sake of convenience, we shall refer to the appellant and relator as either "relator" or "Dispatch" and collectively to the adverse parties, including respondent judge, as "respondents."

Some of the parties have not specifically appeared to oppose the prohibition action, including defendants in the two appeals, but the guardian ad litem [2] for the minor Tessa Reams has been granted leave to intervene in the prohibition action.

Pursuant to Juv. R. 4(B), the purpose of the appointment of a guardian ad litem is "to protect the interests of a child" in a juvenile court proceeding. The purpose of the attorney is to give legal representation to the guardian ad litem and, thus, the ward. A guardian ad litem who is an attorney may also serve as the attorney.

Respondents initially rely upon Juv. R. 27, which provides in pertinent part:

> "The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In a hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. * * *"

Initially, there are two important concepts to be borne in mind with respect to this rule. First, the rule is a

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[2] For some unspecified reason, there is additional counsel for the minor Tessa Reams in addition to counsel for the guardian ad litem, there being no apparent reason why the guardian ad litem does not fully protect the interest of the minor child, and the appointed attorney does not appear to be a substitute for the guardian ad litem.

procedural rule and can have no effect upon substantive or constitutional rights, Section 5(B), Article IV, Ohio Constitution, expressly providing that a rule, such as the juvenile rule, "shall not abridge, enlarge, or modify any substantive right." Secondly, Juv. R. 27 expressly recognizes that, in the ordinary course of events, proceedings before the juvenile court shall be open to the public, and it is only where the judge determines it to be appropriate that the proceedings are to be closed to the general public, the rule failing to set forth any basis, guidelines, or standards to be followed by the judge in making that determination.

Respondents also correctly point out that, like Juv. R. 27, R.C. 2151.35 expressly provides as follows:

> "The juvenile court may conduct its hearings in an informal manner and may adjourn its hearings from time to time. In the hearings of any case, the general public may be excluded and only those persons admitted who have a direct interest in the case.
>
> "* * *
>
> "A record of all testimony and other oral proceedings in juvenile court shall be made in all proceedings that are held pursuant to section 2151.414 of the Revised Code or in which an order or disposition may be made pursuant to division (A)(4) of Section 2151.353 of the Revised Code, and shall be made upon request in any other proceedings. The record shall be made as provided in Section 2301.20 of the Revised Code."

R.C. 2151.35 expressly recognizes and contemplates that, in the ordinary course of events, hearings of the juvenile court shall be open to the public unless the judge orders the public to be excluded, again without setting forth the basis, guidelines, or standards to be utilized by the judge in making a closure determination.

The provision for open hearings is in keeping with the Constitution of Ohio, which expressly provides in Section 16, Article I, that "[a]ll courts shall be open * * *." The Supreme Court has expressly found that this constitutional provision means exactly what it says. *State, ex rel. The Repository,* v. *Unger* (1986), 28 Ohio St. 3d 418; *State* v. *Lane* (1979), 60 Ohio St. 2d 112.

Ohio is a state of public openness. Not only does the Constitution provides that all courts shall be open, with no exception made for juvenile courts, but R.C. 149.43 (B) expressly provides that "[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours."

Although R.C. 149.43(A) makes certain exceptions to this openness requirement, there is no general exception for records of juvenile court proceedings, rather exceptions from being available for inspection include:

> "* * * [M]edical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of Section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law."

R.C. 2151.358 provides for sealing certain records of a juvenile court but does not provide for the withdrawal of all juvenile court records from public scrutiny. It is apparent, therefore, that the general Ohio policy is that court records and court proceedings and hearings are open to the public unless there be some justification for excluding them from public scrutiny. The general public policy of the state as expressed by the Constitution and

the Legislature, moreover, is for public disclosure, rather than closure.

Respondent judge and the guardian ad litem suggest that, in *State, ex rel. The Repository, supra,* it was indicated that there is a presumption of closure in juvenile cases. First, as respondents and the guardian ad litem have themselves pointed out, *Repository* involved a juvenile delinquency proceeding (a "quasi-criminal" proceeding) rather than a civil custody proceeding or a dependency proceeding. Secondly, the reliance is upon a concurring opinion in which only one justice concurred. Third, the concurrence itself does not support respondents' contention, the concurring justice stating at 425-426:

> "My mention of some recognized exceptions to the rule of open courts is not intended to be exhaustive; they are examples only. Each case involving the expulsion of courtroom spectators is to be examined in the context of its own circumstances. It must be reemphasized, however, that '* * * [t]he general rule is that the exclusion of the public should be applied sparingly,' * * * and '* * * [t]he courtroom doors may be closed to the general public only on a rare occasion after a determination that in no other way can justice be served,' * * *. But, what are the rules regarding closure? First, there must be a hearing. *Before closing its doors to the public, a court must make an express findng that there is a substantial probability that the right of the parties to a fair hearing or their other constitutional rghts will be irreparably damaged.* * * * Those present and objecting to closure (at the time the motion for closure is considered) must be given a chance to be heard. If closure is ordered, specific findings are to be made setting forth the need for closure. Absent such findings, court's proceedings must be open to the public. * * * Second, at the hearing to decide

whether closure is warranted, the party who seeks the order normally carries the burden of persuasion. * * *" (Emphasis added.)

The majority opinion in *Repository* is equally definitive with respect to juvenile delinquency proceedngs, it being stated at 420-421 of the opinion:

"The underlying premise of a public trial is that the public is a party to all criminal proceedngs. * * *

"The right of the public to attend criminal trials is also implicit within the guarantees of the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. * * *

"* * *

"This right of access to court proceedings, however, is not absolute. * * * Nevertheless, 'exclusion of the public should be applied sparingly,' * * *. The public and press can be barred from criminal proceedings only in limited circumstances. * * * 'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values as narrowly tailored to serve that interest. * * *'

"Appropriate deference is given to this right of access when the petitioner is given an opportunity to be heard at a proceeding where he may voice his objections. The factors to be considered at such a hearing include, but are not limited to, the nature and weight of the interest to be protected by the closure, the availability of reasonable alternatives that would protect the asserted interest without necessitating closure, and whether the restriction is drawn as narrowly as possible. * * *"

As have many of the cases cited by the parties, *Repository*, although a juvenile proceeding, involved a situa-

tion where criminal penalties are imposed, the juvenile being treated as an offender against justice, with the juvenile offender being afforded certain basic constitutional rights under both the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. *Repository* establishes that the right to a public trial is one of those rights that a juvenile offender possesses.

However, *Repository* goes further and discusses the rights of the public and the rights of the press arising under the First Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, the existence of which is not dependent upon the nature of the proceedings involved. Neither is the application of Section 16, Article I, of the Ohio Constitution, the requirement that the courts be open, dependent upon the nature of the proceedings. Moreover, in a strict criminal-case context, the Ohio Supreme Court in *State, ex rel. Beacon Journal Pub. Co.* v. *Kainrad* (1976), 46 Ohio St. 2d 349, expressly held in the syllabus that, despite contentions that publicity was depriving a criminal defendant of a fair trial:

> "* * * [T]he press and public cannot be excluded from a criminal trial or hearing and no order can be made which prohibits the publishing of news reports about statements made or testimony given during such proceedings until all other measures within the power of the court to insure a fair trial have been found to be unavailing or deficient."

In support of their contention of a presumption of closure, respondents and the guardian ad litem rely upon some cases from other jurisdictions which do so hold but in the context of a statutory provision for closure of courts in juvenile matters, with only those persons, including possibly the press, being admitted as the trial court deems appropriate. Under such a statutory scheme

(if constitutional) it would be incumbent upon the person seeking the exception, that is admission to the court proceedings, to demonstrate why the case involved should be treated differently than the general rule. Contrastly, the Ohio statute and rule contemplate that proceedings in juvenile court will be open but that the trial court may close the proceedings in the exercise of a sound discretion. Necessarily, the burden would be upon the one seeking closure to demonstrate why the instant case should be treated differently from the ordinary case, irrespective of whether the Ohio constitutional provision of openness or the freedom of speech and press apply to juvenile proceedings.

In issuing the gag order, the respondent judge indicated that he would restrict the rights of the adults involved if there be "a scintilla of possibility of harm to the child" and found "a real possibility that the continued attention to this matter will result in harm to the child." Similarly, in the closure order, the court found only that "additional publicity focus on this action might be harmful to the child" and that "a reasonable concern that harm might occur is certainly enough to move the court to protect any child." Notwithstanding these statements, the trial court verbally recognized the existence of a presumption in favor of openness, which it found to be overcome by the interest in protecting the minor child, referring to the necessity of a "full hearing of all relevant evidence" during the custody and dependency hearings. However, to overcome the "presumption of openness," mandated by the Ohio and United States Constitutions, more than mere possibilities of harm to a minor child must be present in order to justify the extreme measure of complete closure of court proceedings, as well as a complete gag order on all parties, and an apparent closure of records.

As we have indicated above, the Ohio constitutional mandate that courts be open and the Ohio and federal constitutional guarantees of freedom of press and of

speech do not exist only with respect to criminal trials. Rather, what is limited to criminal trials is the constitutional right to a public trial. A party's express constitutional right to a public trial is limited to criminal trials, since the constitutional right to "a speedy public trial" conferred by Section 10, Article I, Ohio Constitution, and to "a speedy and public trial" by the Sixth Amendment to the United States Constitution, do pertain only to criminal prosecutions. There is, however, no such limitation in Section 16, Article I, Ohio Constitution, which mandates that "[a]ll courts shall be open" nor in Section 11, Article I, Ohio Constitution, or the First Amendment to the United States Constitution, which confer the rights of freedom of speech and freedom of press.

In *State, ex rel. Fyffe*, v. *Pierce* (1988), 40 Ohio St. 3d 8, relied upon by respondents for a different reason, the court refused to issue a writ of prohibition, finding closure not mandated in juvenile proceedings but permissible only when ordered by the trial court for compelling reasons, acting within sound discretion.

There are some state court decisions holding to the effect that freedom of speech and press do not require that juvenile proceedings ordinarily be open to the public and press, but there is no indication that those states have a constitutional mandate that courts be open, and in most, if not all, instances, there has been a statutory mandate that the proceedings be closed, much as is true with respect to adoption proceedings in Ohio. See, *e.g.*, *In re J. S.* (1981), 438 A.2d 1125, and *Edward A. Sherman Publishing Co.* v. *Goldberg* (1982), 443 A.2d 1252. Other courts have recognized that juvenile proceedings ordinarily should be open but have found that a state statute may create a rebuttable presumption that juvenile proceedings should be closed so long as the public and/or press is given an opportunity to show the state's or juvenile's interest in a closed hearing is neither overriding nor compelling. See, *e.g.*, *Florida Publishing Co.* v. *Morgan* (1984), 253 Ga. 467, 322 S.E.2d 233.

On the other hand, even in the absence of a constitutional mandate of openness, some courts have held that civil trials are open to the public and the press in the absence of some overriding concern. See, *e.g.*, *Barren* v. *Florida Freedom Newspapers, Inc.* (Fla. 1988), 531 So.2d 113, in which Justice Overton stated at 116:

> "At the outset, we hold that both civil and criminal court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and records. In *Craig* v. *Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L. Ed. 1546 (1947), the United States Supreme Court held: 'A trial is a public event. What transpires in the court room is public property. . . . There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.' * * *"

The Florida court, however, recognized there are exceptions, holding that the burden of proof is always upon the person seeking closure and stating at 118:

> "* * * [C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g. national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g. to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. * * *"

In addition, once such necessity be proved, the Florida court required that no closure order be issued unless there be no reasonable alternative available to accomplish the desired result. The court noted that the mere fact custody and medical reports were involved did not justify closing a dissolution proceedings, although also noting that closure would be appropriate if it be "determined that a minor child had been adversely affected by the litigation and the continued publicity would in all likelihood be 'highly detrimental' to that child." Thus, the Florida Supreme Court adopted a highly-detrimental standard rather than the possibility-of-harm standard utilized by the trial court herein.

The same court in another case found constitutional a statute providing that all adoptions and proceedings should be held in closed court. *In the Matter of the Adoption of H.Y.T.* (Fla. 1984), 458 So.2d 1127.

Other courts, even with closure statutes, have found closure of juvenile proceedings to be improper in the face of a constitutional mandate of openness, at least in the absence of the demonstration of some overriding interest. See, *e.g., State, ex rel. Oregonian Publishing Co.*, v. *Deiz.* (Or. 1980), 613 P.2d 23.

The United States Supreme Court has held expressly that the state's interest in protecting juveniles cannot overcome the First Amendment rights of the media to publish news which it has lawfully obtained, including the name of a juvenile being tried before a juvenile court. See *Oklahoma Publishing Co.* v. *District Court* (1977), 480 U.S. 308, 97 S.Ct. 1045, and *Smith* v. *Daily Mail Publishing Co.* (1979), 443 U.S. 97, 99 S.Ct. 2667.

The United States Supreme Court has also found the freedom of speech and press to include the right to attend trials, it being stated in the plurality opinion in *Richmond Newspaper, Inc.* v. *Virginia* (1980), 448 U.S. 555, 100 S.Ct. 2814, at 2826:

> "The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials 'before as many of the people as chuse [*sic*] to attend' was regarded as one of the "inestimable advantages of a free English Constitution of government.' * * * In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. '[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock or information from which members of the public may draw.' *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, * * *."

In footnote 17 of that plurality opinion involving a criminal trial, it is noted: "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."

In a case also involving a criminal trial, the Supreme Court found a statute excluding the general public from trials of specified sexual offenses involving a victim under the age of eighteen to be violative of the First Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. *Globe Newspaper Co.* v. *Superior Court* (1982), 457 U.S. 596, 102 S.Ct. 2613. The court found absolute closure regardless of the circumstances to be unconstitutional. The Supreme Court stated at 2618:

> "The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. * * *

> "Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any 'narrow, literal conception' of the Amendment's terms, * * *."

The court continued at 2620, stating:

> "Although the right of access to criminal trials is of constitutional stature, it is not absolute. * * * But the circumstances under which the press and public can be barred from a criminal trial are 'limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. * * *
>
> "* * *
>
> "We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. * * *"

Later followed two related cases commonly known as *Press-Enterprise I* and *Press-Enterprise II*. In the first, *Press-Enterprise Co.* v. *Superior Court of California* (1984), 464 U.S. 501, 104 S.Ct. 819, there were no dissents, although three judges concurred separately. In the opinion of the court, at 823, it is stated:

> "* * * No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

"The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. * * *

"* * *

" 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' * * * Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. * * * The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. * * *"

In the second case, *Press-Enterprise Co.* v. *Superior Court of California* (1986), 106 S.Ct. 2735, the Supreme Court found the First Amendment right of access to include a right to a transcript of a preliminary hearing growing out of a criminal prosecution. In that case, however, the defendant requested and was granted a closed preliminary hearing. The right asserted was solely the First Amendment right of access. At 2743, the Supreme Court stated:

"* * * If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall

> be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights. * * *"

The court noted that the California Supreme Court had applied a test of "a reasonable likelihood of substantial prejudice," which the United States Supreme Court rejected, stating:

> "* * * As the court itself acknowledged, the 'reasonable likelihood' test places a lesser burden on the defendant than the 'substantial probability' test which we hold is called for by the First Amendment. * * *"

The court continued at 2744:

> "* * * The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation " 'must be narrowly tailored to serve that interest.' " * * *"

The primary rationale of the two dissenting judges was that the test should be *reasonable* probability rather that *substantial* probability. We also note that the dissent of two of the three dissenting judges in *Globe Newspaper, supra*, relied heavily upon the fact that, although closure was mandated by statute, the press had access to a verbatim transcript, stating at 2625:

> "Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the

> interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights. * * * Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the State in protecting child rape victims from the trauma of public testimony. In more than half of the states, public testimony will include television coverage."

Although the Sixth Amendment right to a public trial extends only to criminal cases, the freedom of speech and press protected by both the United States and Ohio Constitutions is not so limited. It is a right personal to the person exercising the right and extends, at least in the case of the press, to the right to gather information to be disseminated to the public by the media. The freedom of the press would be an empty right if it did not include the right to gather information, as well as to print it.

As the United States Supreme Court has repeatedly held, the First Amendment right of freedom of speech and press includes the right to attend a trial in progress before a court, both for the purpose of reporting upon the conduct of that court in the administration of justice and reporting the circumstances involved in that particular case. Only where there is some compelling state interest which, under the peculiar circumstances involved, override the First Amendment right of freedom of speech and press can the public or press be denied access to a trial. This right by its very nature must extend to civil, as well as criminal, trials. Although the nature of the competing right to be protected may vary between criminal and civil trials, the First Amendment right to attend the trial is the same.

The conflicting right asserted here, as in many cases, is one of privacy, in this case involving a minor, including protecting that minor both from public scrutiny and

from immediate personal knowledge of that which is transpiring in the courtroom but which affects the minor's life, not just now but probably for the rest of the minor's life. The basic issue before the trial court is what to do with Tessa Reams—it is the future course of her life that is being litigated. Protection of her rights is a compelling interest; probably as much so as the need to safeguard the physical and psychological well-being of a minor rape victim, as involved in *Globe*, but as in *Globe*, automatic or mandatory closure is not justified.

From the foregoing, we conclude that the constitutional right of freedom of the press and of speech includes the right of access to civil trials as well as criminal trials, not just because of the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment but also pursuant to Sections 11 and 16, Article I, Ohio Constitution, providing for this freedom of speech and press and requiring that courts be open.

Necessarily, the openness requirement and the right of access pertains to juvenile courts, as well as other courts, and is expressly recognized as applicable to juvenile courts by the statute and rule provision that juvenile proceedings shall be open unless closed by a proper order of the court. The burden of demonstrating a proper necessity for closure which overrides the constitutional requirements of openness and access must be borne by the party who seeks closure. Irreparable harm to some public interest or private right so substantial as to overcome the constitutional rights of freedom of speech and press and the constitutional requirement of openness do justify limitations upon the exercise of the rights of freedom of speech and press but only to the extent reasonably necessary to protect that public or private right or interest.

In a juvenile case, long-lasting or permanent psychological damage to a minor would constitute a compelling

interest; whereas, temporary or slight psychological damage would not ordinarily justify closure. Neither would closure ordinarily be justified by merely a finding that the best interests of the minor are that the proceedings be closed. On the other hand, limitation of access to the court, including closure, may in some cases be permitted where the press has an alternate source to all of the information of what transpired in the proceedings, although delayed rather than instant, such as access to a copy of the written transcript of the proceedings, which especially could be a substitute for openness in a situation where in-court testimony of a minor would be so intimidating as to prevent a fair trial for the parties. In any civil case, the question of whether the compelling interest overrides the constitutional rights of the press and the public depends in part upon the effect of the trial court restrictions upon the exercise of such rights. Where the media has full access to all the details of a juvenile case, and closure or lesser restrictive measures will cause no unreasonable damage to the media's ability to report the story involved, closure may be justified under circumstances where closure would not be justified where the trial itself constitutes the media's primary source of information. See *H.Y.T., supra,* which involved the issue of constitutionality of a statute closing adoption proceedings.

Against these standards, we must review the action of the respondent court. First, as noted above, the court applied the wrong standard, dealing in possibilities or potentialities, rather than probabilities. Perhaps the reason the trial court did so is that there was no evidence of probability with respect to the specific minor child involved.

At the closure hearing, there was no expert testimony, although one witness was referred to as an "expert." That witness was the Director of Social Services for the Franklin County Public Defender's office, the guardian

ad litem, who has a degree in social work and is hoping to become a licensed social worker. She was the social worker assigned to the case of the minor Tessa Reams. No issue has been raised on appeal as to the admissibility of her opinion, but it would appear that she would be qualified to render a lay opinion because of her association with the minor child Tessa. Her opinion was essentially that it would not be in the best interests of Tessa to have further or extended media coverage. Her testimony, however, dealt more with the underlying issues in the case than with media coverage focusing upon the question of "who is my mommy and who is my daddy?" She based her opinion, however, upon children generally, rather than Tessa specifically, stating only that there is some potential for a future effect of publicity on Tessa. She admitted that she did not know if the "harm" had already been done but believed the greater the exposure the greater the possibility of harm. In short, there was no evidence before the trial court presented at the closure hearing justifying closure under either the reasonable or substantial probability standard.

There was no evidence specifically directed at the minor child Tessa involved. Rather, the testimony adduced was generalities pertaining to children in general. Under the testimony every juvenile custody or dependency hearing should be closed to the public and media upon request because potentiality for harm exists if the public and media be permitted to attend the hearing.

In light of the Ohio policy and presumption of openness, evidence of generalities that might occur to some children in general is not sufficient justification to close the courtroom. The evidence must demonstrate a basis in the particular case for closure and demonstrate the probability of harm. Possibility of harm obviously exists in every case. Under the trial court's reasoning and pronouncement, every juvenile custody and dependency hearing would, and should, be closed to the public and media.

Since both the statute and rule, as well as the Ohio Constitution, provide to the contrary, the trial court abused its discretion. This does not mean, however, that the proceedings or some part thereof cannot be closed upon the adducing of proper evidence.

As to some evidence during the trial, such as psychological profiles of the foster parents and surrogate mother alluded to during the hearings, closure might be justified in balancing not only the rights of the minor child but also the privacy rights of the parents. Upon the evidence adduced at the closure hearing, however, there is no proper basis upon which the trial court can close the entire proceedings to the public and media. In this regard, we note that the evidence adduced before the gag order proceeding was not before the trial court and properly should not have been, inasmuch as no right of participation, including cross-examination of witnesses or otherwise, was afforded the media during that proceeding.

The gag order proceeding does involve a slightly different situation in light of the evidence adduced at that hearing, which is substantially different from that adduced at the closure hearing. First, the foster mother, Seymour, specifically testified that she had contact with representatives of the media and had permitted the child to be photographed on one occasion. She also indicated that she had agreed to appear on a live television show because she was told that Stotski, the surrogate mother, had agreed to appear. (Stotski denied agreeing to appear.) Seymour has received no compensation for her interviews or press releases and contemplated only a small compensation from the appearance on national television. Stotski also admitted being interviewed by the media but only to assure that her side be told, as well as that of Seymour. She testified that she had advised the national television show representatives that, if she appeared on the television show, she would discuss surrogacy in gen-

eral and not this specific case. She also has received no compensation from the media.

A psychologist did testify at the gag order hearing. Again, however, the testimony was general in nature as to children in general, rather than as to the specific child involved, the psychologist admitting that she had neither met nor performed any evaluation of the child or any of the parties herein. She predicated her opinion upon her experience in custody disputes. As to media coverage, she stated that it varies with the age of the child and that in a younger child, "such events are traumatic and cause emotional problems." [3]

The psychologist testified that being involved in a custody dispute is in and of itself difficult and causes problems for children. She testified that there is a high probability of potential harm arising from the mere existence of the custody dispute which increases as the number of custody litigants increases. She indicated, however, that to exclude the media would tend to lessen the harmful effect naturally inherent in the custody proceedings. She testified that it is contrary to the best interests of a child to have substantial publicity surrounding a custody dispute. She also testified that participation of the child itself in media coverage and publicity would be detrimental to the child without further elucidation. Although she testified that her opinion was in part based on studies, she refused to disclose the studies upon which she relied when asked on cross-examination by Seymour (acting *pro se*). The psychologist also admitted that the atmosphere of the media coverage would vary the result and "if it were done professionally," there might be no in-

[3] In light of the general nature of the psychologist's testimony, we see no possible reasonable basis for sealing the transcript of the psychologist's testimony, even assuming there might be some predicate for sealing the remainder. Also, sealing the transcript is questionable since representatives of the media were (quite properly) permitted to attend the hearing.

creased harm to the child. The psychologist testified that children should be shielded from knowledge of any custody dispute from any source, including the parents. The psychologist did testify that there would be harm to a minor to learn that those she knows as being her mother and father are not in fact her mother and father and that she may have to go to a stranger. Such testimony appears to bear more upon the eventual merit issues than upon the question of a gag order since separation from the foster parents could be the eventual decision in the trial court cases.

No issue is raised with respect to the order prohibiting the photographing or appearance or interviewing of the child herself. However, the evidence adduced does not justify the scope of the gag order issued against the parties, even assuming that the evidence marginally permits some type of restraint, such as interviews and photographs, while permitting some contact with the media, no greater than would be permitted by the Code of Professional Responsibility with respect to criminal matters and juvenile disciplinary matters. See Disciplinary Rule 7-107. Even if the evidence adduced at the gag order hearing also be considered, there is insufficient evidence to permit a finding that closure is necessary under the circumstances. In other words, the evidence now before the court does not establish a reasonable (much less a substantial) probability that permanent harm will result to the minor child as a result of trial publicity, or that substantial or severe temporary harm will result to the child, which will have an enduring effect. There is no evidence that any harm that has not already occurred will result to the child as a result of the media being present and reporting the events during the trial. On the other hand, there does appear to be a real possibility that circumstances will arise during the trial that might necessitate and justify the trial court's excluding the public and press from a limited portion of the testimony in order to prevent lasting harm to the child and preserve

the privacy rights of a party of such a nature as to override the right of the public and media to be present during the trial. In short, the trial court erred and abused its discretion in the sweeping form that the gag and closure orders were issued. After additional hearing and evidence, some type of limitation may be appropriate.

Having found the trial court erred and abused its discretion and that the effect of the gag order and closure order issued by the trial court is unduly to limit the exercise by the Dispatch of its right of access as an adjunct of the freedom of the press guaranteed under the Ohio and United States Constitutions, the issue arises as to the type of relief to which the Dispatch is entitled; that is, whether prohibition or a reversal of the orders is appropriate.

In *Repository, supra,* the Ohio Supreme Court held explicitly that prohibition is a proper remedy where a trial court has improperly closed the court, thereby infringing upon the constitutional rights of the media. In neither case addressed by that was a full preclosure proceeding conducted. In one case, no proceedings were conducted and in the other the judge made no determination "that closure was essential to protect an overriding interest, that the closure was drawn as narrowly as possible to protect only that overriding interest, or that no viable alternatives to closure were available." Here the trial court not only held a preclosure proceeding prior to issuance of the closure order and in a technical sense made the requisite determinations, even though the standards utilized were inappropriate. Neither in *Repository* nor in *State, ex rel. Dayton Newspapers,* v. *Phillips* (1976), 46 Ohio St. 2d 457, relied upon by the *Repository* court, was the question of a right to appeal raised or discussed. A reported decision, even though the issue could have been raised, is not authority upon an issue that was neither raised nor determined by the decision. *State, ex rel. Gordon,* v. *Rhodes* (1952), 158 Ohio St. 129.

We conclude, however, that the closure order is appealable by the Dispatch. R.C. 2501.02 provides that, included among the orders which constitute final appealable orders, are those which affect a substantial right and are made in a special proceeding.

That the right of the Dispatch exercising the freedom of the press is a substantial right cannot be questioned. All the cases cited above indicate that the right of the press to attend a trial is so substantial that it can be denied only for some overriding interest which is so compelling as to justify restrictions upon the freedom of the press. The other question is whether a special proceeding is involved. Under the present balancing test first pronounced in *Amato* v. *General Motors Corp.* (1981), 67 Ohio St. 2d 253, the determination of whether a special proceedings is involved is by way of balancing the harm to the prompt and orderly disposition of litigation through waste of judicial resources resulting from an immediate appeal, with the need for immediate review because appeal after final judgment is not practicable. In *Repository, supra,* at 419, it was noted, even though the order which was the subject of the action had been terminated since hearings and trial being of short duration, a closure order issued in connection with a hearing or trial may normally expire before an appellate court can decide its validity. Nevertheless, the court found the issue not to be moot. Here, the orders are not moot, this court having issued an order staying the closure and gag orders and the trial court having elected to continue the trial to a later date rather than to conduct it with the press present. Under the *Amato* balancing test, there is no question but that the closure order is immediately appealable. In fact, it would be appealable even under ordinary final order considerations.

By its very nature, as indicated above, a preclosure proceeding is ancillary to, not an integral part of, the pending proceedings in which the closure order is issued.

For the many reasons stated above, not only is a preclosure hearing necessary, but the media must be afforded an opportunity to participate in such hearng, which the trial court did in this instance with respect to the preclosure proceeding. The gist of our decision in the unreported case, *State, ex rel. Dispatch Printing Co.*, v. *Petree*, No. 88AP-980 (Oct. 25, 1988), unreported, is that the constitutional right of freedom of the press requires that court proceedings not be closed to the press unless a preclosure hearing is held, at which the press may attend and participate and appropriate findings made justifying closure. *Repository, supra*, reaches a similar conclusion. The Dispatch was a proper party to the preclosure proceeding and had a right to participate therein upon request and, thus, was a party to that proceeding. However, the Dispatch was not a party to any other portion of either of the cases pending in the trial court, being a party only to the ancillary preclosure proceeding. Thus, all rights with respect to the Dispatch were determined by the preclosure proceeding order, and the case terminated as to the Dispatch at that time. Accordingly, we find that the closure order is appealable. On the other hand, the gag order is not appealable since the Dispatch was not a party to that proceedings, although its representative, a reporter, was allowed to be present.

The next issue is whether the appeal constitutes an adequate remedy at law precluding prohibition. Under the circumstances of this case, we find no reason that the remedy of appeal does not constitute an adequate remedy.

Nevertheless, a writ of prohibition is appropriate with respect to the gag order and, arguably, with respect to the closure order, since the trial court has yet to make appropriate findings justifying the issuance of a closure order. The effect of *Dayton* and *Repository* is that a trial court lacks jurisdiction to issue a closure order

unless it has afforded an opportunity to the parties and the media to be heard at a preclosure hearing and, upon proper supporting evidence, makes a factual determination peculiar to the case at hand that the public or private rights and interests involved are so substantial and will be so adversely affected as to override the presumption of openness mandated by the Ohio and United States Constitutions.

The degree of impact upon the ability of the media to gather and report news has a bearing upon the type of order that should be issued even where closure is permitted, but even in that event the closure should be to the minimum extent necessary to protect the compelling public or private rights which have overcome the presumption of openness. In this case, for the reasons set forth above, the evidence is insufficient to permit a finding that either complete closure or an absolute gag order is necessary to protect compelling rights and interests or even that the presumption of openness has been overcome. By this we do not mean to indicate that the trial court may not conduct further appropriate hearings utilizing the proper standards and issue either a limited gag or limited closure order tailored to protect such compelling rights and interests. However, the sweeping orders issued herein are supported neither by evidence nor law.

Accordingly, we issue the following orders. In case No. 89AP-323, the prohibition action, a writ of prohibition will issue, prohibiting respondent court from enforcing either the February 27, 1989 gag order or the March 10, 1989 closure order unless and until the respondent judge or court has conducted an evidentiary hearing and made appropriate findings in accordance with this opinion and applicable law and has tailored the order to meet the specific needs and circumstances of the cases involved. In case No. 89AP-331 and case No. 89AP-332, the appeal from the February 27, 1989 gag

order is dismissed, but the assignment of error is sustained with respect to the March 10, 1989 closure order, and the order of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is reversed, and these causes are remanded to that court for further proceedings in accordance with law consistent with this opinion.

Writ of prohibition granted;
appeal from gag order dismissed;
closure order reversed;
and causes remanded.

BOWMAN and AMMER, JJ., concur.

AMMER, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

APPENDIX C

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS
JUVENILE BRANCH

Case No. 87JU-09-6347

BEVERLY REAMS,
Plaintiff

v.

KEITH ROBERT O'DONNELL,
Defendant

Case No. 89JU-02-1215

IN RE: TESSA REAMS,
Alleged Dependent Minor Child

DECISION and JUDGMENT ENTRY

[Filed Mar. 10, 1989]

These matters are before the court for consideration of identical four-branch motions filed in each case by the guardian ad litem for Tessa Reams, a minor. The guardian seeks orders from this court excluding the print and broadcast media from attending any trials or hearings in these matters, prohibiting the media and all other non-parties from access to court files in these mtaters, establishing limitations on the media regarding coverage of any trials or hearings, and requiring that a hearing be held, after notice, of any requests by the media for access

to court files regarding these matters. On March 8, 1989, the court conducted a hearing of these motions. It should be noted that S. Michael Miller, Prosecuting Attorney for Franklin County, representing the interests of the State of Ohio in this matter, joined with the guardian in urging the court to make the requested orders.

Both of these cases concern Tessa Reams, a minor child born January 12, 1985. The circumstances surrounding Tessa's birth involve an arrangement for "surrogate parenting" and the resulting litigation has engendered an unusual amount of attention from the media, print and electronic, locally and nationally. Awaiting hearing before this court are motions seeking custody of Tessa filed on behalf of three of the significant adults in her life, as well as a petition filed by her guardian ad litem to determine if she is a dependent child.

The guardian's motions, *inter alia*, seek to exclude the press from the hearings on the central issue of custody. Drawn into sharp juxtaposition by this litigation are two sets of fundamental values, that of the freedom of the press and the corollary right of the public to access to information, and, that of the need for society to protect its children and always to act in the best interest of those who are victims and unable to protect and defend themselves from the consequences of the actions of others.

I

First amendment jurisprudence establishes the primacy of the rights enforced under its rubric by establishment of a presumption in favor of the openness of all judicial proceedings in this nation and this state, *State, ex rel. The Repository v. Unger*, 28 Ohio St. 418 (1986), Ohio Const. art. I, sec. 16. This presumption is not conclusive, however, but may be overcome in circumstances where a competing, overriding interest is found to exist and the preservation of that overriding interest neces-

sitates invasion of the first amendment rights, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982). Thus, the task for this court is to determine if an overriding interest exists, and, if so, must the right of free access be invaded to protect that interest.

II

In fact, two distinct interests are present in this litigation which compete with the values protected by the first amendment. The first interest arises from the obligation of the court to protect the child generally. The second arises from the obligation of the court to determine and then to act in the best interest of the chiid in the resolution of the custody and dependency issues before it, Ohio Rev. Code sec. 3109.04.

The evidence presented at the hearing established that additional publicity focused on this action might be harmful to the child, particularly because negative disclosures made in the course of testimony in the custody hearing about adults who she loves might "get back" to her, causing hurt, confusion, and emotional damage." Although the testimony was not conclusive that such harm would necessarily occur, such a high degree of certainty cannot be required when the potential harm is to a child. A reasonable concern that harm might occur is certainly enough to move the court to protect any child. In addition, the fact that the child may have already suffered from the publicity already given this matter does not relieve this court of its duty to protect her in the future.

The second interest is also of deep concern to the court. The resolution of custody disputes is the most serious and complex of all matters presented to this court, as well as other, wiser triers of such issues, *see*, I Kings 3.16. The court must be confident that no impediment is permitted to interfere with its inquiry into the best

interest of the child. The guardian ad litem, being aware of the potential for harm to the child from press coverage of the trial, may well be placed in a position in which he must evaluate available evidence not solely on the basis of whether or not it advances the inquiry regarding the custodial determination. He must also, given his duty to protect the child, evaluate the danger to his ward from likely publication of the testimony or other evidence. The decsion he makes in resolving this conflict may well impede the obligation of the court to determine the best interest of the child.

III

As established by testimony at the hearing, three important benefits might arise from press coverage of the custody trial, including a general increase in public awareness of issues surrounding surrogate parenting, in increase in awareness of potential pitfalls by those contemplating surrogacy, and an increased public understanding and confidence in the judicial process. All these benefits are of high value, and underlie the very existence of the first amendment freedoms and the presumption in favor of open proceedings. However, the court finds that the interests in protecting Tessa Reams and in a full judicial exploration of all relevant evidence bearing on her best interest in the custody dispute are overriding and the presumption in favor of openness is overcome in this case. The motions of the guardian ad litem are sustained.

The necessity that a full hearing of all relevant evidence be conducted in this custody contest in an orderly fashion prevents exclusion of the media on a "piece meal" basis. Clearly the court and the public share an interest in the efficient administration of justice and constant opening and closing of proceedings in process is an impediment to that goal. Moreover, it is impossible to anticipate when material potentially harmful to the

child might be presented at trial. No less intrusive means of insuring the best interest of the child other than complete exclusion is appropriate.

ORDER

It is therefore ORDERED that the trial and all other proceedings in this matter shall be closed to all news media and members of the public, except parties, witnesses (subject, of course, to a separation order), counsel, and necessary court personnel. It is further ORDERED that the files and records of this court shall not be examined by the news media or members of the public, other than parties, their counsel, and necessary court personnel, without an order of this court granted after notice to all interested parties and hearing, R.C. 2151.35.

/s/ Ronald L. Solove
RONALD L. SOLOVE, Judge

Copies to:

All counsel of record

John W. Zeiger
Steven J. McDonald
Attorneys for The Dispatch Printing Company

APPENDIX D

IN THE COMMON PLEAS COURT OF
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS
JUVENILE BRANCH

Case No. 89JU-02-1215

IN THE MATTER OF: TESSA REAMS, an alleged dependent minor child

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JUDGMENT ENTRY

[Filed Feb. 27, 1989]

This cause came on for hearing upon the Motion of Counsel and Guardian ad Litem for the minor child, Tessa Reams, for orders restraining, prohibiting and enjoining all parties hereto, counsel for all parties and all those acting in concert or on behalf of all parties from disseminating any information concerning the pending custody and dependency actions or the minor child herein to any and all persons, organizations and entities including, but not limited to representatives of both broadcast and print media, and, from appearing on any and all radio or television broadcast regarding these causes or the minor child herein, and, from otherwise providing any information regarding these causes or said child either directly or indirectly in any fashion whatsoever.

This cause came on for hearing on the 21st day of February, 1989 and the Court finds that all parties appeared in court either in person or through counsel and upon the evidence adduced, the court further finds that said motion is well taken and hereby sustains same.

It is therefore ORDERED that all parties hereto including Beverly Seymour (fka Beverly Reams), Richard Reams, Norma Stotski, Joseph Stotski and Leslie Miner, and, all representatives of those parties including counsel as well as the Guardian ad Litem for the minor child, David L. Strait and Counsel for child, Charles K. Milless and all those associated with said counsel, and, all others acting in concert or association with or on behalf of the above said persons are hereby RESTRAINED, PROHIBITED and ENJOINED from disseminating any information about this pending cause or about the minor child Tessa Reams to any and all persons, organizations and entities, including, but not limited to, representatives of both the broadcast and print media; and further all said persons are RESTRAINED, PROHIBITED and ENJOINED from appearing on any and all radio or television broadcasts regarding these causes or the minor child herein; and, all said parties are further RESTRAINED, PROHIBITED and ENJOINED from otherwise providing any information regarding these causes or said child either directly or indirectly in any fashion whatsoever.

It is further ORDERED that no transcript of this hearing shall be released without the court's permission.

The effective date of all the above shall be the 21st of February, 1989.

/s/ Ronald L. Solove
Judge

Copies mailed to:

Charles K. Milless, Counsel for Tessa Reams
David L. Strait, Guardian ad Litem
Patricia L. Grimm, Attorney for Norma Stotski
Beverly Seymour
Andrea Yogoda, Attorney for Richard Reams
Suzanne Sabol-Phalen, Attorney for Leslie Miner